# 07-1310-bk(L)

**07-1319-bk(CON), 07-1325-bk(CON)**

IN THE

## United States Court of Appeals

FOR THE SECOND CIRCUIT

IN RE: SPIEGEL, INC., ET AL.,

*Debtors.*

BICO STUPAKOFF AND RUSSELL JAMES,

*Appellants,*

—against—

OTTO (GMBH & CO KG), OTTO DOOSAN LTD., and OTTO SUMISHO INC.,

*Appellees.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

## BRIEF FOR APPELLANTS

ALAN HALPERIN
NEAL W. COHEN
HALPERIN BATTAGLIA RAICHT, LLP
555 Madison Avenue, 9th Floor
New York, New York 10022
(212) 765-9100

DAVID J. FISCHER
JONATHAN W. YOUNG
JEFFREY L. GANSBERG
WILDMAN, HARROLD, ALLEN & DIXON
225 West Wacker Drive
Chicago, Illinois 60606
(312) 201-2000

*Attorneys for Appellants*
*Bico Stupakoff and Russell James*

## TABLE OF CONTENTS


| | Page |
|---|---|
| PRELIMINARY STATEMENT | 1 |
| JURISDICTIONAL STATEMENT | 2 |
| STATEMENT OF THE ISSUES PRESENTED | 4 |
| STATEMENT OF THE CASE | 5 |
| STATEMENT OF FACTS | 6 |
| The Unauthorized Use and Distribution of the Photographs | 6 |
| The Rosenbaum Litigation | 7 |
| The Spiegel Bankruptcy Proceeding | 9 |
| The Adversary Complaint | 10 |
| SUMMARY OF ARGUMENTS | 10 |
| ARGUMENT | 11 |
| I. THE BANKRUPTCY COURT IMPROPERLY DISMISSED THE PHOTOGRAPHERS' ADVERSARY COMPLAINT | 12 |
| A. Standard of Review | 12 |

B. The Bankruptcy Court and the District Court Misapplied the Applicable Standard of Review on a Motion to Dismiss ..... 12

C. The Photographers Have Pled That They Were Entitled To Actual Notice ..... 15

D. The Bankruptcy Court Recast the Photographers' Complaint In An Attempt to Rationalize Its Dismissal ..... 20

II. THE JUNE 22, 2006 HEARING SHOULD HAVE BEEN CONTINUED TO PROTECT THE PHOTOGRAPHERS' DUE PROCESS RIGHTS ..... 22

A. Standard of Review ..... 22

B. The Court's Substantive Hearing on the Photographers' Rights Violated Their Due Process Rights ..... 23

C. The Rosenbaum Order Deprives The Photographers Of Their Right To Have Their Claims Heard By Adversary Proceeding, As Required By The Federal Rules Of Bankruptcy Procedure ..... 27

D. Assuming Without Conceding That The June Hearing Was Procedurally And Constitutionally Valid, The Bankruptcy Court Erred In Summarily Dismissing The Photographers' Well Pled Lack Of Notice And Due Process Claims..... 29

III. THE BANKRUPTCY COURT AND DISTRICT COURT SHOULD HAVE MODIFIED THE RELEASE AND INJUNCTION TO PRESERVE THE STATUS QUO ..... 30

A. Standard of Review ..... 30

B. The Injunction Should Have Been Modified for the Limited Purpose Requested ..... 30

1. Pursuant To Applicable Second Circuit Case Law, The Motion Was Timely Filed..... 31

2. The Bankruptcy Court Failed To Provide The Photographers With A Sufficient Hearing On The Merits Of Their Motion ..... 31

3. Judicial Notice Provided Ample Record Support For The Relief Requested..... 33

4. The Bankruptcy Court Abused Its Discretion In Declining To Modify The Plan Injunction For The Limited And Modest Purpose Requested ..... 34

CONCLUSION ..... 36

## TABLE OF AUTHORITIES

**Cases**

*Bell Atlantic Corp. v. Twombly*,
127 S. Ct. 1955 (2007) .....12, 13, 14, 15, 16

*Chance v. Armstrong*,
143 F.3d 698 (2d Cir. 1998)..... 18

*Civic Assoc. of the Deaf of New York City, Inc. v. Giuliani*,
970 F. Supp. 352 (S.D.N.Y. 1997)..... 35

*Comer v. Cisneros*,
37 F.3d 775 (2d Cir. 1994)..... 22

*Conboy v. AT&T Corp.*,
241 F.3d 242 (2d Cir. 2001)..... 12

*Courtenay Communications Corp. v. Hall*, 334 F.3d 210
(2d Cir. 2003).....13, 14, 18

*Fogel v. Zell*,
221 F.3d 955 (7th Cir. 2000) ..... 26

*Hochroth v. William Penn Life Ins. Co. of N.Y.*, No. 03 Civ.7286,
2003 WL 22990105 (S.D.N.Y.
Dec. 19, 2003).....20, 21

*In re Adelphia Business Solutions, Inc.*,
280 B.R. 63 (Bankr. S.D.N.Y. 2002) ... 27

*In re Chapman*,
154 B.R. 258 (Bankr. N.D. Ill. 1993) .. 19

*In re Dinova*,
212 B.R. 437 (B.A.P. 2d Cir. 1997) .... 19

*In re Docktor Pet Ctr., Inc.*,
144 B.R. 14 (Bankr. D. Mass. 1992) ... 28

*In re Haedo*,
211 B.R. 149 (Bankr. S.D.N.Y. 1997) . 28

*In re Med. Tech., Inc.*,
No. 05-47377-RFN-11,
2006 WL 2519530
(Bankr. N.D. Tex. June 26, 2006) ..... 19

*In re Metromedia Fiber Network, Inc.*,
416 F.3d 136 (2d Cir. 2005)..... 5

*In re Orion Pictures Corp.*,
4 F.3d 1095 (2d Cir. 1993) .....27, 28, 29

*In re Pro Page Ptnrs, LLC*,
No. 2:05-CV-166,
2006 U.S. Dist. Lexis 52250
(E.D. Tenn. July 28, 2006) ..... 19

*In re Randbre Corp.*,
66 B.R. 482 (Bankr. S.D.N.Y. 1986) ... 19

*In re ROPT Ltd. P'ship*,
209 B.R. 144 (B.A.P. 1st Cir. 1997).... 25

*In re Texaco Inc.*,
254 B.R. 536 (Bankr. S.D.N.Y. 2000).. 26

*In re Zale Corp.*,
62 F.3d 746 (5th Cir. 1995) ..... 29

*Irish Lesbian & Gay Org. v. Giuliani*,
143 F.3d 638 (2d Cir. 1998)..... 25

*Koppel v. 4987 Corp.*,
167 F.3d 125 (2d Cir. 1999)..... 18

*Kramer v. Time Warner Inc.*,
937 F.2d 767 (2d Cir. 1991)..... 33

*Mennonite Bd. of Missions v. Adams*,
462 U.S. 791 (1983) .....17, 25

*Mizuho Corp. Bank (USA) v. Cory & Assocs., Inc.*,
341 F.3d 644 (7th Cir. 2003) ..... 21

*Mullane v. Central Hanover Bank & Trust Co.*,
339 U.S. 306 (1950) .....17, 19, 25

*Nelson v. Adams USA, Inc.*,
529 U.S. 460 (2000) ..... 25

*New York State Assoc. for Retarded Children, Inc. v. Carey*,
706 F.2d 956 (2d Cir. 1983)..... 35

*Pani v. Empire Blue Cross Blue Shield*,
152 F.3d 67 (2d Cir. 1998)..... 33

*Peralta v. Heights Medical Center, Inc.*,
485 U.S. 80 (1988) ..... 25

*Price v. Caruso*,
451 F.Supp.2d. 889
(E.D. Mich. 2006).....20, 21

*Satcorp Int'l Group v. China Nat'l Silk Import & Export Corp.*,
101 F.3d 3 (2d Cir. 1996) ..... 25

*Schermerhorn v. Local 100, Transport Workers Union of Am.*,
No. 93 Civ. 6686, 1995 WL 677092
(S.D.N.Y. Aug. 17, 1995)..... 26

*Scheuer v. Rhodes*,
416 U.S. 232 (1974) ..... 13

*Sierra Club v. United States Army Corps of Engineers*,
732 F.2d 253 (2d Cir. 1984) .....30, 35

*Stupakoff v. Otto (GmbH & Co KG)*,
no. 06 Civ. 09385(NRB);
no. 06 Civ. 13584(NRB),
no. 06 Civ. 13585, 2007 WL 656902
(S.D.N.Y. Feb. 28, 2007) ..... 1

*Swierkiewicz v. Sorema N.A.*,
534 U.S. 506 (2002) .....12, 13, 14, 16

*Sys. Fed'n No. 91, Ry. Employees' Dep't, AFL-CIO v. O.V. Wright*,
364 U.S. 642 (1961) ..... 35

*Twentieth Century Fox Film Corp. v. Marvel Enters., Inc.*,
220 F. Supp.2d 289 (S.D.N.Y. 2002).... 33

*United States v. Swift & Co.*,
286 U.S. 106 (1932) ..... 35

*Whelton v. Educ. Credit Mgmt. Corp.*,
432 F.3d 150 (2d Cir. 2005) .....21, 31

*Wynder v. McMahon*,
360 F.3d 73 (2d Cir. 2004)..... 15

**Federal Statutes**

28 U.S.C. § 158 ..... 3

28 U.S.C. § 1291 ..... 3

28 U.S.C. § 1334 ..... 2

**Rules**

Fed. R. Bankr. P. 7001(6) ..... 27
Fed. R. Bankr. P. 7001(7) ..... 27
Fed. R. Bankr. P. 7001(9) ..... 27
Fed. R. Bankr. P. 7009 ..... 12
Fed. R. Bankr. P. 7012 ..... 28
Fed. R. Civ. P. 60(b)(5) ..... 34
Fed. R. Civ. P. 60(b)(6) ..... 34
Fed. R. Civ. P. 8(a) ..... 12
Fed. R. Civ. P. 8(f) ..... 13

## PRELIMINARY STATEMENT

Appellants Bico Stupakoff and Russell James (collectively, the "Appellants" or "Photographers") have taken this appeal from a decision by United States District Judge Naomi Reice Buchwald in consolidated appeals of three decisions by United States Bankruptcy Judge Burton Lifland. Judge Lifland (i) dismissed an adversary proceeding filed by the Photographers against Appellees Otto (GmbH & Co KG), Otto Doosan Ltd. and Otto Sumisho Inc. (collectively, the "Appellees" or the "Otto Entities"), seeking a declaration that the release and injunction contained in the confirmed plan of Spiegel, Inc. could not be enforced against the Photographers, (ii) entered an order on another party's motion containing language broad enough to deem the Photographers' claims against the Otto Entities to be barred by the plan release and injunction and (iii) declined to modify the Spiegel plan release and injunction to permit the Photographers to file their class action complaint against the Otto Entities, pending adjudication of the validity of the release and injunction. Judge Buchwald affirmed Judge Lifland's decisions in their entirety. *See Stupakoff v. Otto (GmbH & Co KG),* no. 06 Civ. 09385(NRB); no. 06 Civ. 13584 (NRB), no. 06 Civ. 13585, 2007 WL 656902 (S.D.N.Y. Feb. 28, 2007) (slip opinion)(available on Westlaw).

## JURISDICTIONAL STATEMENT

The United States Bankruptcy Court for the Southern District of New York (the "Bankruptcy Court") had jurisdiction over the issues raised in this appeal pursuant to 28 U.S.C. § 1334. All of these issues arose in or are related to the Chapter 11 proceeding of Spiegel, Inc., pending as Case No. 03-11540 in the Bankruptcy Court. The issues raised before the Bankruptcy Court were: (i) whether the plan release and injunction were enforceable against the Photographers given the failure to provide them advance actual notice of such relief, (ii) whether the plan release and injunction should be declared enforceable against the Photographers on another party's motion, without affording the Photographers a hearing on their due process arguments and (iii) whether the plan injunction should be modified to permit the Photographers to file their class action complaint pending adjudication of the validity of the release and injunction.

The Bankruptcy Court ruled on the foregoing issues through its Findings of Fact, Conclusions of Law, and Order Denying Motion of Peter Rosenbaum Photography Corporation for a Declaratory Ruling Pursuant to Sections 105(a) and 1109 (b) of the Bankruptcy Code, Etc. and Denying Related Relief (the "Rosenbaum Order") and the Opinion and Order Denying Plaintiff's Request for an Order Modifying the Plan Injunction and Granting Defendants' Motion to Dismiss (the "Photographer Order"). *See* Appendix A-698 – A-726; A-1505 – A-1546. The Rosenbaum Order was entered on August 16, 2006. *See* Appendix A-

698 – A-726. The Photographers filed a timely notice of appeal from the Rosenbaum Order on August 25, 2006. The Photographer Order was entered on November 1, 2006. *See* Appendix A-1505 – A-1546. The Photographers filed a timely notice of appeal from the Photographer Order on November 10, 2006. Both the Rosenbaum Order and the Photographer Order were final orders of the Bankruptcy Court. The United States District Court for the Southern District of New York (the "District Court") had jurisdiction over these appeals pursuant to 28 U.S.C. § 158.

On February 28, 2007, the District Court issued its Memorandum Opinion and Order and Judgment Order affirming the Rosenbaum Order and the Photographer Order in their entirety. *See* Appendix A-1547 – A-1554. The Memorandum Opinion and Order and Judgment Order constitute a final judgment on the issues raised on appeal in the District Court, which disposes of all the Photographers' claims in their entirety. On March 29, 2007, the Photographers filed their timely notices of appeal from the Opinion and Order. *See* Appendix at A-1555 – A-1566. On May 14, 2007, this Court entered an order consolidating the three appeals taken from the Memorandum Opinion and Order and Judgment Order. This Court has jurisdiction over the consolidated appeals from the District Court pursuant to 28 U.S.C. §1291.

## STATEMENT OF THE ISSUES PRESENTED

I. Whether the District Court erred in affirming the Bankruptcy Court's dismissal of an adversary proceeding seeking declaratory relief as to the enforceability of a plan release and injunction where the Plaintiff-Appellants pled that (i) they lacked actual notice of such injunction and release provisions, (ii) they were known creditors entitled to actual notice, and (iii) the lack of notice violated their constitutional rights to due process of law.

II. Whether the District Court erred in dismissing as moot the appeal of the Bankruptcy Court order declaring a non-debtor release contained in the confirmed plan of Spiegel, Inc. to be generally valid and enforceable where (i) the Appellants raised due process and notice objections to such release, (ii) Appellants filed a separate adversary proceeding to adjudicate these objections; and (iii) Appellants never received a hearing on these objections.

III. Whether the District Court erred in affirming the Bankruptcy Court's denial of a request to modify a plan injunction barring litigation against non-debtor parties where (i) the modification was sought for the limited purpose of filing a pleading to toll applicable statutes of limitation, (ii) no harm or prejudice would inure to the non-debtor parties as a result of such filing, and (iii) the validity and enforceability of the injunction is subject to dispute and challenge.

## STATEMENT OF THE CASE

These consolidated appeals present the question of how far a bankruptcy court may go to impair the rights and claims held by absent parties against entities other than the Debtor. The confirmed plan of Spiegel, Inc. contained a broad release and injunction purporting to extinguish a wide variety of claims against entities other than Spiegel and its related debtors (the "Release and Injunction"). This type of "non-debtor release" represents the very outer limits of the Bankruptcy Court's power and jurisdiction, and is generally reserved for the most exceptional of circumstances. *See In re Metromedia Fiber Network, Inc.*, 416 F.3d 136, 141-43 (2d Cir. 2005) ("While none of our cases explains when a non-debtor release is 'important' to a debtor's plan, it is clear that such release is proper only in rare cases."). The Appellee Otto Entities now contend that this Release and Injunction bars substantial copyright infringement and related claims asserted against them by the Photographers. However, the Photographers were never given actual notice of the proposed extinguishment of their claims prior to such relief being granted.

The Photographers filed an adversary proceeding seeking a declaration that the Release and Injunction were unenforceable against them, due to the failure to provide them constitutionally sufficient notice. *See* Appendix at A-545 – A-555. The Photographers also sought to continue a hearing on another party's motion addressing the enforceability of the Release and Injunction, or alternatively to obtain a finding

that the ruling on the other party's motion would not have preclusive effect against them. *See* Appendix A-516 – A-536. Finally, the Photographers sought to modify the injunction (without conceding its validity), so as to file their class action complaint pending adjudication of these issues. *See* Appendix A-727 – A-741.

The Bankruptcy Court ruled against them on all three issues. *See* Appendix A-698 – A-726; A-1505 – A-1546. Through entry of the Rosenbaum Order and Photographer Order, the Bankruptcy Court determined that the Release and Injunction were generally enforceable against the Photographers, dismissed their adversary proceeding, and declined to modify the injunction. The Photographers timely appealed from these rulings. The District Court affirmed in all respects. *See* Appendix A-1547 – A-1554. The Photographers then timely appealed to this Court.

## STATEMENT OF FACTS

### The Unauthorized Use and Distribution of the Photographs

The Photographers provided a limited license to Spiegel, Inc., one of the Debtors, for the use of certain of the Photographers' photographs in Spiegel's catalogue. *See* Appendix at A-518, A-547. The license did not permit Spiegel to transmit the photographs for use by other entities. *See Id.* at A-518. Notwithstanding the limited nature of this license, and in direct contravention of the license terms, Spiegel trans-

ferred the photographs for use by the Otto Entities. *See Id.* at A-518. The Otto Entities had neither a valid license nor permission to use these photographs. *See Id.* at A-518, A-547.

**The Rosenbaum Litigation**

On January 30, 2004, Peter Rosenbaum Photography Corporation ("Rosenbaum") brought suit (the "Illinois Complaint") against the Otto Entities in the United States District Court for the Northern District of Illinois (the "Illinois Court"). *See Id.* at A-548. The filing of the Illinois Complaint initiated the Illinois Litigation, which was assigned case no. 04-cv-00767. *See Id.* The Illinois Complaint sought damages from the Otto Entities for their unauthorized use of Rosenbaum's images. *See Id.*

During the summer of 2004, Otto Doosan and Otto Sumisho filed motions to dismiss the Illinois Complaint. *See Id.* at A-549. While the motions to dismiss were pending, the parties engaged in limited discovery related to the allegations contained in the motions to dismiss.

On October 20, 2005, Otto Doosan and Otto Sumisho filed their answers and affirmative defenses to the Illinois Complaint. *See Id.* at A-552. Neither answer asserted a defense based upon the claims pled having been released in the confirmed Debtors' Modified First Amended Joint Plan of Reorganization of Affiliated Debtors Pursuant to Chapter 11 of the Bankruptcy Code (the "Plan"). *See Id.* In early November of 2005, Rosenbaum sought leave of the Illinois Court to amend the Illinois Complaint. *See Id.* at A-553.

The proposed amendment alleged additional causes of action, and sought to have the Illinois Complaint certified as a class action. *See Id.* at A-518. A week after Rosenbaum sought leave to file his amended complaint, Otto Doosan and Otto Sumisho filed a notice of injunction. *See Id.* at A-553. On November 15, 2005, after receiving service of the Illinois Complaint, Otto (GmbH & Co KG) also filed a notice of injunction. This notice referenced the existence of the Release and Injunction contained in Spiegel's confirmed Plan, and asserted that the claims pled in the Illinois Complaint were subject to such Release and Injunction. *See Id.* at A-552. This was the first time that the Release and Injunction had been brought to the attention of the Illinois Court. *Id.* at A-553.

On April 10, 2006, Rosenbaum filed his Motion to Temporarily Lift the Stay of Proceedings for the Limited Purpose of Filing a Second Amended Class Action Complaint (the "Second Class Action Complaint") to be filed. Attached to the motion was the Second Class Action Complaint. Contrary to the findings of the Bankruptcy Court, this was the first complaint which referenced the Photographers by name. Before considering Rosenbaum's proposed amendment, the Illinois Court directed Rosenbaum to seek relief in the Bankruptcy Court as to the enforceability and applicability of the Release and Injunction. *See Id.* at A-553.

**The Spiegel Bankruptcy Proceeding**

On March 17, 2003, the Debtors filed petitions for relief under chapter 11 of Title 11, United States Code. *See Id.* at A-548. In March 2005, the Bankruptcy Court entered an order approving the Debtors' disclosure statement and setting a hearing on confirmation of the Plan. *See Id.* at A-550. The Plan contained the Release and Injunction which purport to release and enjoin all claims against the Otto Entities, non-debtors, that relate to Spiegel or its affiliated co-Debtors. *See Id.* at A-547, A-548, A-552. Despite their knowledge that the Otto Entities had used the Photographers' images without license or permission, neither the Otto Entities nor Spiegel advised the Photographers of the Release and Injunction, or of the other relief sought against them in Spiegel's Chapter 11 plan. *See Id.* at A-551, A552. This failure of notice occurred, notwithstanding (i) Spiegel's and the Otto Entities' knowledge of the Illinois Litigation and (ii) the contention by Spiegel and the Otto Entities that the Illinois Litigation is barred by the Release and Injunction. *See Id.* at A-550, A-551. The Court confirmed the Plan on May 25, 2005, and the Plan went effective on June 21, 2005. *See Id.* at A-552.

**The Adversary Complaint**

The Adversary Complaint seeks a declaration that the Release and Injunction are unenforceable against the Photographers because entry of these provisions violated the Photographers' constitutional rights to due process of law. *See gen-*

*erally Id.* at A-545- A-555. The Photographers allege in their Adversary Complaint that they were known creditors of both Spiegel and the Otto Entities, and thereby entitled to actual notice of the relief sought against them in the Plan, including the Release and Injunction. *See Id.* at A-546. Consistent with Rule 7001 of the Federal Rules of Bankruptcy Procedure, the Photographers sought their requested declaratory relief by adversary proceeding. *Id.*

## SUMMARY OF ARGUMENTS

I. The Bankruptcy Court and District Court failed to apply the correct legal standard in reviewing the Motion to Dismiss. Rather than reviewing the Adversary Complaint and construing all facts in favor of the Photographers, the Bankruptcy Court and the District Court made findings adverse to the Photographers. By making factual findings and determining that the Photographers could not prove facts to support their claims, the Bankruptcy Court and the District Court went beyond the face of the Adversary Complaint and failed to follow the law in deciding the Motion to Dismiss.

II. The Bankruptcy Court and the District Court deprived the Photographers of their due process rights by failing to continue the hearing on a third party's motion which might implicate the Photographers' rights. Alternatively, the Bankruptcy Court and the District Court failed to provide adequate protection to the Photographers to ensure that any ruling made in the con-

text of a third party's motion would not prejudice the Photographers.

III. The Bankruptcy Court and the District Court improperly refused to modify the Release and Injunction to allow the Photographers to bring suit to prevent potential expiration of a statute of limitations while the foregoing issues are adjudicated. In so doing, the Bankruptcy Court and the District Court failed to provide the Photographers with a hearing on the merits of their motion, instead determining that the motion was untimely and that the Photographers failed to set forth substantive facts which would allow the relief sought. Instead of allowing the Photographers to amend or supplement their motion, the Bankruptcy Court denied it outright.

## ARGUMENT

The issues in this case center on the intersection of third party releases and publication notice in bankruptcy cases. Separately, each tests the limits of a Bankruptcy Court's jurisdiction and authority. Combined, they have a synergistic effect which may exceed the Bankruptcy Court's power and authority. This case is such a case. By failing to provide **any** notice to the Photographers that their claims would be extinguished, the Otto Entities doomed their Release and Injunction to failure as against the Photographers.

## I. THE BANKRUPTCY COURT IMPROPERLY DISMISSED THE PHOTOGRAPHERS' ADVERSARY COMPLAINT

### A. Standard of Review

The District Court's affirming of the grant of a motion to dismiss is reviewed *de novo*. *See Conboy v. AT&T Corp.*, 241 F.3d 242, 246 (2d Cir. 2001).

### B. The Bankruptcy Court and the District Court Misapplied the Applicable Standard of Review on a Motion to Dismiss

Both the District Court and the Bankruptcy Court applied an improper standard in reviewing the Adversary Complaint in response to the Motion to Dismiss. Pursuant to Rule 8 of the Federal Rules of Civil Procedure, a plaintiff need only include " . . . a short and plain statement of the claim showing that the pleader is entitled to relief . . ." Fed. R. Civ. P. 8(a); *see also Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 508 (2002). This pleading standard applies to all civil pleadings with only limited exceptions – none of which are applicable in this case. *See Swierkiewicz*, 534 U.S. at 513; *see also* Fed. R. Bankr. P. 7009. Further, the Supreme Court has determined that the heightened pleading standard of Rule 9 of the Federal Rules of Civil Procedure should not be extended to matters other than those set forth in Rule 9. *Swierkiewicz*, 534 U.S. at 513; *see also Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1955, 1972 n.14 (2007) (if

Rule 9 is to be extended, it must be by legislation). If a particular class of action is not encompassed by the plain language of Rule 9, the underlying cause of action need not be pled with particularity. *See Swierkiewicz*, 534 U.S. at 513.

The Federal Rules of Civil Procedure require that "[a]ll pleadings shall be so construed as to do substantial justice." Fed. R. Civ. P. 8(f); *see Swierkiewicz*, 534 U.S. at 514. If a complaint fails to provide sufficient notice of the claims, the correct procedural mechanism is a motion for more definite statement – not a motion to dismiss. *Swierkiewicz*, 534 U.S. at 514. All that is required is that the complaint give fair notice of the basis for the claims alleged. *Id.* "Indeed it may appear on the face of the pleadings that a recovery is very remote or unlikely but that is not the test." *Id. quoting Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974). It cannot be doubted that the Photographers' Adversary Complaint, taken as a whole, "renders their entitlement to relief plausible." *Bell Atlantic*, 127 S. Ct. at 1972 n.14. And, that is all that is required to defeat a motion to dismiss.

In reviewing whether a complaint evidences that the relief sought is plausible, a court must "accept all of plaintiff's factual allegations in the complaint as true and draw inferences from those allegations in the light most favorable to the plaintiff." *Courtenay Communications Corp. v. Hall*, 334 F.3d 210, 213 (2d Cir. 2003). "[A] complaint need only meet the requirements of our 'simplified notice pleading standard [which] relies on liberal discovery rules and summary

judgment motions to define disputed facts and issues and to dispose of unmeritorious claims.' " *Id. quoting Swierkiewicz*, 534 U.S. at 512; *see also Bell Atlantic*, 127 S. Ct. at 1964-65. The pleading standard requires a "reasonably founded hope that the [discovery] process will reveal relevant evidence to support the claim." *Bell Atlantic*, 127 S. Ct. at 1969 n.8 (citation omitted). Further, a complaint need not include detailed factual allegations, but must provide only the " 'grounds' of [plaintiff's] entitlement to relief' ". *Id.* at 1964-65. This must include "more than labels and conclusions, and a formulaic recitation of the elements of a cause of action." *Id.* at 1965.

In reviewing a motion to dismiss, a court may not consider matters outside the pleadings unless it converts the motion to one for summary judgment. *See Courtenay Communications*, 334 F.3d at 213. This "vigorous enforcement of the conversion requirement helps ensure that courts will refrain from engaging in fact-finding when considering a motion to dismiss . . ." *Id.* Contrary to this well established authority, the Bankruptcy Court and the District Court both looked past the face of the Adversary Complaint to determine that the Photographers would be unable to prove their causes of action. This was improper and mandates reversal. *Id.*

Under *Bell Atlantic*, which sets forth the Supreme Court's latest pronouncement on the pleading standard required to survive a motion

to dismiss[1], the Adversary Complaint is properly pled. *Bell Atlantic* requires only that the allegations taken as a whole support the cause of action pled. *Bell Atlantic*, 127 S. Ct. at 1973 n.14. It does not require that any specific factual allegations be made. *Id.* Nor does it require any heightened pleading standard. *Id.* ("In reaching this conclusion, we do not apply any 'heightened' pleading standard, nor do we seek to broaden the scope of Federal Rule of Civil Procedure 9 . . .").

### C. The Photographers Have Properly Pled That They Were Entitled To Actual Notice

The Photographers have properly pled that they were entitled to, but did not receive, actual notice of the Release and Injunction. *Wynder v. McMahon*, 360 F.3d 73, 77 (2d Cir. 2004) (a complaint only need meet the requirements of Fed. R. Civ. P. 8 with "a short and plain statement of the claims showing that the pleader is entitled to relief" and that the complaint gives the defendant notice of the plaintiff's claim and the grounds upon which it rests). In paragraph 24 of the Complaint, the Photographers pled that "[Photographers] were known creditors of the Debtors and parties to an agreement with the Debtors." *See* Appendix at A-549. In paragraphs 7 through 11 of the Adversary Complaint, the Photographers pled the events leading up to the improper Release and Injunction, including their

[1] It is unclear whether *Bell Atlantic* is limited only to antitrust cases or has larger applicability to general civil litigation.

contractual relationship with Spiegel and the lack of any contractual relationship with the Otto Entities – despite the latter's use of the Photographs. *See Id.* at A-547. Further, in paragraph 25 of the Complaint, the Photographers pled "Defendants knew or should have known that the Plan granted relief for their benefit, and against the [Photographers], and that the [Photographers] were therefore entitled to notice of such relief, including but not limited to notice of the Plan and Disclosure Statement (as defined below.)" *See Id.* at A-549. In paragraph 26, the Photographers pled that they "did not receive notice of the Plan and Disclosure Statement or of the Release contained therein." *Id.* These allegations, taken as a whole, meet the liberal pleading criteria imposed by Rule 8 and mandate that the Motion to Dismiss be denied. *Bell Atlantic*, 127 S. Ct. at 1973 n.14; *see also Swierkiewicz*, 534 U.S. at 514 (noting the allegations of termination based upon age, the events leading up to the termination, and those involved in the termination easily satisfy the requirements of fair notice).

Contrary to the mandate from this Court that pleadings be interpreted liberally with all inferences interpreted in favor of the plaintiff, the Bankruptcy Court (and the District Court in its summary affirmance)[2, 3] looked beyond the face of

[2] The Photographers will refer primarily to the Bankruptcy Court's opinion, given the brevity of the District Court's analysis, and its concurrence in the Bankruptcy Court's findings and rulings.

(*footnote 3 appears on next page*)

the Adversary Complaint to rationalize its wrongful dismissal. In so doing, the Bankruptcy Court ignored or discounted the well pled allegations that the Photographers were known creditors of the Debtors, and known to both the Debtors and the Otto Entities. *See* Appendix at A-549. These allegations, if taken as true, required that the Photographers be given actual notice of the Plan and Disclosure Statement and of the Release and Injunction contained therein. *See Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950) ; *Mennonite Bd. of Missions v. Adams*, 462 U.S. 791, 798-800 (1983).

It has not been (and cannot be) disputed that the Photographers did not receive actual notice of the Plan or the Release and Injunction. Instead, the Otto Entities have argued that the Photographers were not known creditors and were therefore entitled only to notice by publication, which publication did occur. Apparently ignoring the well pled allegations of the Adversary Complaint, the Bankruptcy Court accepted this argu-

---

[3] In its summary affirmance, the District Court inserted a footnote into its Memorandum and Order which stated: "[w]e need not review the bankruptcy court's holding that the Photographers' suit for a declaratory judgment is also barred by Federal Rule 60 . . ." *See* Appendix at A-1550. Despite that footnote, it continued to opine that any declaratory judgment action would also fail. In so doing, it adopted incorrect findings of the Bankruptcy Court and made an advisory opinion as to what the Bankruptcy Court would have done (and what it would have approved) if the Bankruptcy Court "had [] addressed that issue expressly." *Id.* Such advisory opinion is improper and should be given no import or effect.

ment. *See* Appendix at A-708 – A-709. The Bankruptcy Court stated "[t]hey were not, under all the facts that are not contested here, known creditors." *See Id.* at A-1458.

The Bankruptcy Court's ruling on this point appears to rely upon supposed facts which must be adduced after discovery and not in reviewing a motion to dismiss. *See Koppel v. 4987 Corp.*, 167 F.3d 125, 133 (2d Cir. 1999) ("[W]e note the District Court's unfortunate choice of words in its opinion, which might suggest that it did not apply the proper standard for a motion to dismiss under Rule 12 (b)(6)."). Quite simply, "[i]t is important to recognize the difference between disposing of a case on a 12(b)(6) motion and resolving the case later in the proceedings, for example by summary judgment." *Chance v. Armstrong*, 143 F.3d 698, 791 (2d Cir. 1998) ("At the 12(b)(6) stage, '[t]he issue is not whether a plaintiff is likely to prevail ultimately, but whether the claimant is entitled to offer evidence to support the claims. Indeed it may appear on the face of the pleading that a recovery is very remote and unlikely, but that is not the test.' "). "Specifically, the District Court's opinion appeared in several places to require [plaintiffs] to *prove* sufficient facts or to *produce* evidence to prove their claims . . . A plaintiff, of course, need only *allege*, not *prove*, sufficient facts to survive a motion to dismiss." *Koppel,* 167 F.3d at 133 (emphasis in original); *see also Courtenay Communications* 334 F.3d at 213. In the Adversary Complaint, the Photographers have "alleged facts that are not impossible to prove and that, if

demonstrated, would state a legally cognizable claim." *Chance*, 143 F.3d at 701.

The Otto Entities can be expected to argue that the adequacy of notice to the Photographers presents a question of law that need not be taken as true for purposes of a motion to dismiss. This argument, if made, conflicts with persuasive authority holding that lack of notice generally presents a question of fact that is inappropriate for resolution on a motion to dismiss. *See In re Pro Page Ptnrs, LLC*, No. 2:05-CV-166, 2006 U.S. Dist. Lexis 52250, at *19 (E.D. Tenn. July 28, 2006) (whether notice was adequate is a question of material fact); *In re Med. Tech., Inc.*, No. 05-47377-RFN-11, 2006 WL 2519530, at *6 (Bankr. N.D. Tex. June 26, 2006) (recognizing that determination of known versus unknown creditor must be determined on a case by case basis). The Supreme Court's decision in *Mullane* likewise acknowledges the case specific nature of notice inquiries. *See Mullane*, 339 U.S. at 314 . "An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, *under all of the circumstances*, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Id.* (emphasis added); *see also In re Randbre Corp.*, 66 B.R. 482, 485 (Bankr. S.D.N.Y. 1986). "[C]ourts must look to the totality of the circumstances in determining whether notice was reasonable." *In re Dinova*, 212 B.R. 437, 443 (B.A.P. 2d Cir. 1997) (*quoting In re Chapman,* 154 B.R. 258, 263 (Bankr. N.D. Ill. 1993).

Here, the factual nature of the allegations is even clearer, as the inquiry into the sufficiency of notice must begin with the question of whether the Photographers were known creditors. It was improper for the Bankruptcy Court to determine, as a matter of *law*, that the Photographers were not known creditors entitled to actual notice within the context of deciding the Motion to Dismiss. Rather, the Bankruptcy Court was required to accept the well-pled allegation that the Photographers were known creditors entitled to actual notice.

### D. The Bankruptcy Court Recast the Photographers' Complaint In An Attempt to Rationalize Its Dismissal

In the only instance in which the Bankruptcy Court accepted the well-pled allegations of the Adversary Complaint, it mischaracterized the nature of the Photographers' cause of action. *See* Appendix at A-1467, A-1474. Specifically, the Bankruptcy Court re-cast the Adversary Complaint as a request for modification of the confirmed Plan, rather than a claim for declaratory relief as to whether specific plan provisions are enforceable against the Photographers. In so doing, the Bankruptcy Court violated the fundamental principle that a plaintiff is the master of its complaint. *Price v. Caruso*, 451 F.Supp.2d. 889, 893 (E.D. Mich. 2006); *Hochroth v. William Penn Life Ins. Co. of N.Y.*, No. 03Civ.7286, 2003 WL 22990105, at *1 (S.D.N.Y. Dec. 19, 2003). The plaintiff can "characterize his causes of action as he pleases" and the Bankruptcy Court cannot recharacterize the allegations contained therein

to assist it in dismissing the complaint. *Hochroth*, 2003 WL 22990105 at*1 (*citing Mizuho Corp. Bank (USA) v. Cory & Assocs., Inc.*, 341 F.3d 644, 651 (7th Cir. 2003)). A court "should neither reinvent a plaintiff's complaint nor plead allegations that the plaintiff wishes not to pursue." *Price*, 451 F. Supp.2d at 893.

Despite how the Adversary Complaint was recharacterized by the Bankruptcy Court, the Photographers are not seeking to revoke or amend the Confirmation Order or the Plan. Rather, they are seeking a determination that the Release and Injunction do not apply to them as a result of the lack of due process. This case therefore bears striking procedural similarities to the *Whelton* case recently decided by this Court. *See Whelton v. Educ. Credit Mgmt. Corp.*, 432 F.3d 150, 156 n.2 (2d Cir. 2005). In *Whelton*, the plaintiff filed an adversary proceeding seeking a declaratory judgment that it could not be bound by a provision contained in a confirmation order. The debtor defendant argued that the creditor was seeking to revoke the confirmation order and that such request was untimely. This Court found that the adversary proceeding was not one to revoke a confirmation order but one "to declare one of the provisions of a confirmed plan void *ab initio*." *Id.* Additionally, this Court decided that a motion to determine the efficacy of a provision of a confirmed plan was timely when brought within two years of confirmation. *Id.*

The relief being requested by the Photographers is far less drastic than that sought in *Whelton*. The Photographers do not seek a dec-

laration that a plan provision is void *ab initio*. Rather, they seek a far narrower determination that a specific plan provision cannot be enforced against them, due to lack of notice. In no way can the Photographers be said to seek revocation or modification of a confirmed plan. The Bankruptcy Court's findings and conclusions to the contrary are utterly lacking in record support, and are clearly erroneous.

## II. THE JUNE 22, 2006 HEARING SHOULD HAVE BEEN CONTINUED TO PROTECT THE PHOTOGRAPHERS' DUE PROCESS RIGHTS

### A. Standard of Review

Whether the District Court erred in dismissing as moot the Bankruptcy Court's denial of the Motion to Continue presents a question of law which must be reviewed *de novo*. *See Comer v. Cisneros*, 37 F.3d 775, 787 (2d Cir. 1994). So long as this Court is able to fashion relief protecting the Photographers' rights, this dispute is not moot. And if this Court concurs with the Photographers that the Adversary Complaint should not have been dismissed, then the denial of the Motion to Continue must be addressed in order to prevent the summary disposition and dismissal of these claims through the Rosenbaum Order.

### B. The Court's Substantive Hearing on the Photographers' Rights Violated Their Due Process Rights

The Bankruptcy Court improperly held a hearing on and determined the Photographers' substantive rights on June 22, 2006 (the "June Hearing") when it should have continued the hearing or excluded the Photographers from any relief granted. In the Photographers' initial appeal of that ruling, the District Court found the matter moot because it upheld the Bankruptcy Court's ruling on the Motion to Dismiss.[4]

In another denial of the Photographers' due process rights, the Bankruptcy Court made substantive rulings against them in a hearing held on the motion of a third party in which the Photographers did not participate. It did so while the Photographers had pending the Adversary Complaint which sought substantially similar relief as the third party motion but which had not yet been joined by the parties. Further, at the June Hearing, the Bankruptcy Court recognized that it could not make any such ruling as a result of the pendency of the Adversary Complaint. *See* Appendix at A-561 ("How do I do that [issue a finding or ruling that has preclusive effect on the Photographers] if issue hasn't been joined on a complaint you filed only a few days ago?"). Judge Lifland conveyed a similar position a short time later:

---

[4] As with the appeal of the Motion to Dismiss, the Photographers will refer to the Bankruptcy Court and its opinion because the District Court issued no substantive opinion on the issue.

> [a]s should be clear from my inquiry here, the Court is ready to go forward with this matter. Rosenbaum has brought this matter before the Court in one fashion, **the other moving parties are asking for an adjournment in an entirely different fashion. I don't even have the same vehicle to deal with**. Interestingly, the request for declaratory judgment is brought on by motion, not by adversary proceeding. But nevertheless, still we have the issue joined in that regard. And with respect to the motion, the parties have labored mightily to do that and bring this before the Court in a clear and coherent fashion. **So the Court is ready to go forward today. The application for an adjournment is denied. And the request for a special finding that has been made by the moving parties has no foundation or basis** for me to grant; these are two different parties they may be linked in Illinois. **Whatever the issue is with Rosenbaum and how that ends up will be determined at the end of the day**.

Appendix at A-565 – A-566 (emphasis added).

Judge Lifland could not have been clearer—at least in his comments from the bench—that the Photographers' claims had been raised through a different procedural "vehicle," and that Rosenbaum's claims and only Rosenbaum's claims would be determined "at the end of the day." *See*

Appendix at A-566. Judge Lifland also refused to adjourn the hearing, or otherwise to make a finding as to the preclusive effect of the Rosenbaum ruling. *Id.* The remaining argument at the June Hearing addressed the Rosenbaum Motion, **and did not touch on the Photographers' underlying claims, the lack of notice and due process in connection with the Release and Injunction at all**. *See generally* Appendix at A-566 – A-592.

It necessarily follows that, to the extent the Bankruptcy Court purported to decide their claims at the June Hearing, the Photographers were not reasonably apprised of that possibility, and were not given constitutionally sufficient notice of the proposed relief sought against them. *See Mullane*, 339 U.S. at 319; *see also Irish Lesbian & Gay Org. v. Giuliani*, 143 F.3d 638, 646 (2d Cir. 1998). Because the constitutionally required notice was not given, the Bankruptcy Court lacked authority to decide the claims pled in the Adversary Complaint in the context of the third party motion. *See Mullane*, 339 U.S. at 319; *see also Nelson v. Adams USA, Inc.*, 529 U.S. 460, 466-69 (2000); *Peralta v. Heights Medical Center, Inc.*, 485 U.S. 80, 84-87 (1988); *Satcorp Int'l Group v. China Nat'l Silk Import & Export Corp.*, 101 F.3d 3, 5-7 (2d Cir. 1996); *In re ROPT Ltd. P'ship*, 209 B.R. 144, 151-52 (B.A.P. 1st Cir. 1997). The Bankruptcy Court therefore committed reversible error when it included language in the Rosenbaum Order purporting to decide the Photographers' claims. *See* Appendix at A-707.

The Otto Entities may argue that, because the Photographers were represented by counsel at the June Hearing, the Photographers necessarily received sufficient notice of such hearing. This argument, if made, ignores that the existence of some degree of notice of a proceeding does not conclude the constitutional inquiry. *See Mennonite Bd. of Missions*, 462 U.S. at 799 ("[A] party's ability to take steps to safeguard its interest does not relieve [another party] of its constitutional obligations."). The more pertinent question is whether that notice was **adequate**, under the circumstances, to apprise the Photographers of the relief purportedly sought against them at the June Hearing. Adequate notice has two components: (i) delivery and (ii) content. *In re Texaco Inc.*, 254 B.R. 536, 561 (Bankr. S.D.N.Y. 2000); *see also Fogel v. Zell*, 221 F.3d 955, 962-63 (7th Cir. 2000). If the notice is unclear, even if it was received, it will not be deemed to be adequate notice. *In re Texaco Inc.*, 254 B.R. at 561 (*citing Fogel*, 221 F.3d at 962-63); *see also Schermerhorn v. Local 100, Transport Workers Union of Am.*, No. 93 Civ. 6686, 1995 WL 677092, at 5-7 (S.D.N.Y. Aug. 17, 1995).

Here, there can be little doubt that both the delivery and content of the "notice" given to the Photographers was constitutionally insufficient. The mere fact that they were aware of the June Hearing means nothing. The comments made by the Otto Entities—both in their papers and at the June Hearing—signaled that the June Hearing would not be dispositive of the Photographers' claims. Judge Lifland confirmed as much

through his own comments from the bench. *See* Appendix at A-566. Far from receiving sufficient notice of the relief sought against them, the Photographers were persuaded by their opponent and the Bankruptcy Court that the June Hearing was neither the time nor the place to urge their due process arguments.

### C. The Rosenbaum Order Deprives The Photographers Of Their Right To Have Their Claims Heard By Adversary Proceeding, As Required By The Federal Rules Of Bankruptcy Procedure.

The Photographers properly sought declaratory relief against the Otto Entities through the filing of an adversary proceeding. *See* Fed. R. Bankr. P. 7001 (6), (7), (9). As the Bankruptcy Court acknowledged, at the time of the June Hearing, the parties were not yet at issue in the Adversary Proceeding. *See* Appendix at A-561. Indeed, the June Hearing was initiated on the **motion** of a **non-party** to the adversary proceeding. Accordingly, the June Hearing was not the appropriate time or place for the Photographers to pursue their request for declaratory relief. The Bankruptcy Court appeared to recognize this fact when it inquired how it could determine preclusive effect before the Otto Entities answered the Adversary Complaint and issue had been joined. *See Id.*

The Bankruptcy Court had no authority to issue a ruling on the Adversary Complaint in the context of the Rosenbaum Motion. *See In re Orion Pictures Corp.*, 4 F.3d 1095, 1098-99 (2d Cir.

1993) (adversary proceeding issues could not be determined in the context of a motion to assume an executory contract); *see also In re Adelphia Business Solutions, Inc.*, 280 B.R. 63, 84 (Bankr. S.D.N.Y. 2002) (in context of §366 motion court cannot try the merits of an actual underlying dispute (*citing In re Orion,* 4 F.3d at 1098-99)). Motions and adversary proceedings are fundamentally distinct. *In re Orion,* 4 F.3d at 1098. A motion is a summary proceeding and an adversary proceeding contemplates "prolonged discovery or a lengthy trial with disputed issues." *Id.* 1098-99 (*citing In re Docktor Pet Ctr., Inc.*, 144 B.R. 14, 16 (Bankr. D. Mass. 1992)). By deciding the Rosenbaum Motion in a manner which foreclosed the relief sought in the Adversary Complaint, the Bankruptcy Court vitiated the requirement of Bankruptcy Rule 7001 that requests for declaratory relief be resolved by adversary proceeding.

Because the Photographers asserted their declaratory judgment claims by means of the Adversary Complaint, those claims could not and should not have been extinguished absent a proper motion to dismiss under Fed. R. Bankr. P. 7012, and compliance with the requirements and standards applicable to review of such a motion. *See* Fed. R. Bank. P. 7012; *see also In re Orion,* 4 F.3d at 1098; *In re Haedo*, 211 B.R. 149, 153-54 (Bankr. S.D.N.Y. 1997) (court required adversary proceeding be brought to determine matter referenced in Rule 7001, even when parties did not object to procedural posture of motion).

The Photographers assuredly did not waive their rights to proceed by the Adversary Complaint. They did not participate in the June Hearing on the merits of the Rosenbaum Motion. *See generally* Appendix at A-556 – A-597. Additionally, the June Hearing did not provide the Photographers with the protections to which they would otherwise be entitled in litigating an adversary proceeding. *In re Orion*, 4 F.3d at 1098; *In re Zale Corp.*, 62 F.3d 746, 763 (5th Cir. 1995). For example, the Photographers never received an answer to their claims and had no opportunity to conduct discovery thereon. (One of the key facts pled by the Photographers in the Adversary Complaint, that they were known creditors of the Debtors and the Otto Entities, is unquestionably in dispute.) Under no construction of the June Hearing can the Otto Entities argue that the Photographers received the rights and protections afforded by a full adversary proceeding—rights and protections to which they were entitled under Rule 7001.

**D. Assuming Without Conceding That The June Hearing Was Procedurally And Constitutionally Valid, The Bankruptcy Court Erred In Summarily Dismissing The Photographers' Well Pled Lack Of Notice And Due Process Claims.**

The Rosenbaum Order purports to extinguish the Photographers' lack of notice and due process claims in summary fashion. In effect, this order purports to declare that the Release and Injunction are generally enforceable against a broad

range of parties, including but not limited to the Photographers. In making this declaration, the Bankruptcy Court effectively dismissed the Photographers' claim for declaratory relief, and entered contrary declaratory relief requested by the Otto Entities. As explained in the preceding sections of this brief, the June Hearing was constitutionally and procedurally invalid. Yet assuming without conceding that the Photographers claims could have been addressed (or were actually addressed at this hearing), the Bankruptcy Court plainly erred in summarily dismissing these well pled claims for all the reasons set forth in Section I of this Argument.

## III. THE BANKRUPTCY COURT AND DISTRICT COURT SHOULD HAVE MODIFIED THE RELEASE AND INJUNCTION TO PRESERVE THE STATUS QUO.

### A. Standard of Review

The issue to be decided on this appeal presents a question of law. A review of a denial of a Rule 60(b) motion is subject to an abuse of discretion standard. *Sierra Club v. United States Army Corps of Engineers*, 732 F.2d 253, 257 (2d Cir. 1984).

### B. The Injunction Should Have Been Modified for the Limited Purpose Requested.

In declining to grant the requested and limited modification of the injunction, the Bankruptcy Court erred in four distinct respects. First, the Bankruptcy Court misinterpreted controlling Second Circuit law in ruling that the request for modification was untimely. Second, the Bankruptcy Court erred in failing to permit the Photographers to supplement the record on their request. Third, the Bankruptcy Court improperly disregarded a valid and timely request for judicial notice of facts that would have remedied the supposed deficiencies in the record. Finally, the Bankruptcy Court failed to apply the appropriate factors as to whether the Release and Injunction could properly be modified, and consequently reached an erroneous conclusion on this point. The relief requested was narrowly drawn to protect the valid and legitimate interests of the Photographers and the absent class members they seek to represent, without prejudicing the Otto Entities in any legally cognizable manner.

#### 1. Pursuant To Applicable Second Circuit Case Law, The Motion Was Timely Filed.

Contrary to Judge Lifland's conclusions and characterizations, controlling Second Circuit precedent establishes that the Photographers' motion was timely filed. *See Whelton v. Educ. Credit Mgmt. Corp.*, 432 F.3d 150, 156 n.2 (2d Cir. 2005). In the *Whelton* case, the Second Cir-

cuit held that a motion challenging the enforceability of a specific plan provision was timely where made within two years of plan confirmation. Judge Lifland offers neither reason nor basis for his attempt to distinguish the *Whelton* decision. Indeed, the plaintiff in *Whelton* occupied a far weaker position than the Photographers, given that such plaintiffs had knowledge of the bankruptcy and plan at issue. *See generally Whelton*, 432 F.3d at 153-54. And the Photographers sought relief far sooner than the Plaintiffs in *Whelton*.

### 2. The Bankruptcy Court Failed To Provide The Photographers With A Sufficient Hearing On The Merits Of Their Motion.

In what appears to be a recurring theme in the Photographers' various disputes with the Otto Entities, the Bankruptcy Court effectively deprived the Photographers of a meaningful day in court on their request for modification of the injunction. At the hearing, the Bankruptcy Court challenged the sufficiency of the motion, based upon the Photographers' supposed failure to identify the applicable statute of limitations sought to be tolled. When the Photographers requested time and an opportunity to correct this supposed deficiency, Judge Lifland rejected the request, reasoning that the hearing was being held "many, many, many weeks after the issue on this argument had been joined." *See* Appendix at A-1407.

This characterization of the timing and posture of the motion was demonstrably wrong, and constituted a further abuse of discretion by the Bankruptcy Court. The Otto Entities filed their Response (the "Response") to the motion on October 13, 2006, a mere six days before the October hearing. *See generally* Appendix at A-848 – A-864. It was not until October 16, 2006—three days prior to the hearing—that the Otto Entities filed Exhibit A to their Response. *See generally Id.* at A-902 – A-903. Worse still, the argument about the sufficiency of the record (regarding the applicable statutes of limitation) was made for the first time in the Response. Far from being a patent procedural defect apparent to the parties for "many, many, many weeks prior to the hearing," the supposed insufficiency[5] was first brought to the Photographers' attention within one week of the hearing. *See generally Id.* at A-848 – A-864. And Judge Lifland declined to permit the hearing to be adjourned so that the record could be supplemented—**even though it was the Photographers that filed the underlying motion**. In short, the record could not be clearer that the parties were at issue for the briefest of intervals prior to the October Hearing. *Compare* Appendix A-848 A-864 with A-1398 – A-1462. It was an abuse of discretion to deny the Photographers' request to supplement the record, and then to deny the motion based upon the perceived inadequacy of such record.

---

[5] As will be explained hereinafter, the Photographers dispute the Bankruptcy Court's conclusion that the requested relief could not have been granted without further detail about the applicable statutes of limitation.

### 3. Judicial Notice Provided Ample Record Support For The Relief Requested.

The Bankruptcy Court further abused its discretion in failing to take judicial notice of record facts which would support the relief requested in the Motion. *See Kramer v. Time Warner Inc.*, 937 F.2d 767, 774 (2d Cir. 1991) (court can take judicial notice of documents filed in other cases); *Twentieth Century Fox Film Corp. v. Marvel Enters., Inc.*, 220 F. Supp.2d 289, 293 n.4 (S.D.N.Y. 2002) (same). After Judge Lifland rejected the request to adjourn the hearing to permit supplementation of the record, counsel for the Photographers asked the Bankruptcy Court take judicial notice of (i) the date of filing of the Illinois Complaint (January 30, 2004) and (ii) the statute of limitations governing copyright claims (three years). *See* Appendix at A-1412 – A-1413; *see also Pani v. Empire Blue Cross Blue Shield*, 152 F.3d 67, 75 (2d Cir. 1998) (court can take judicial notice of public documents and statues); *see also Kramer*, 937 F.2d at 774. The Bankruptcy Court declined to do so. Had it taken judicial notice of these matters, the supposed insufficiency of the record would have been eliminated. This request for judicial notice was both timely and wholly proper. It is inexplicable why the Bankruptcy Court would have chosen not to honor this request, and Judge Lifland does not even attempt to offer any such explanation. *See generally* Appendix at A-1398 – A-1462.

### 4. The Bankruptcy Court Abused Its Discretion In Declining To Modify The Plan Injunction For The Limited And Modest Purpose Requested.

The Bankruptcy Court committed plain error by failing to modify the Plan injunction for the limited purpose of allowing the Photographers to file, but not prosecute, their class action complaint. Federal Rule of Civil Procedure 60(b)(5) and/or (6) provide a more than sufficient basis to grant the relief requested by the Photographers. Under either subsection of the statute, the prejudice and harm to the Photographers (and the absent class members they seek to protect) far outweigh any claim of injury by the Otto Entities. A fair and considered balancing of the hardships in this case will admit of only one conclusion: the Otto Entities suffer no cognizable injury if the relief is granted. In contrast, if the Plan injunction is not modified, potential causes of action may be irreparably lost.

The facts and circumstances of this case supply an ample equitable basis for the Plan injunction to be modified as requested by the Photographers. This modification is sought for the narrow purpose of permitting the Photographers to file (but not prosecute) the Amended Complaint. The "power of a court to modify a decree of injunctive relief is long-established, broad, and flexible." *New York State Assoc. for Retarded Children, Inc. v. Carey*, 706 F.2d 956, 967 (2d Cir. 1983). "An injunction is an ambulatory remedy that marches along according to the nature of the proceeding." *Sierra Club v. United States Army*

*Corps of Eng'rs*, 732 F.2d 253, 256 (2d Cir. 1984). A court should modify an injunction if the injunction "has been turned through changing circumstances into an instrument of wrong." *Sys. Fed'n No. 91, Ry. Employees' Dep't, AFL-CIO v. O.V. Wright*, 364 U.S. 642, 647 (1961) (*quoting United States v. Swift & Co.*, 286 U.S. 106, 114-115 (1932)); *see also Civic Assoc. of the Deaf of New York City, Inc. v. Giuliani*, 970 F. Supp. 352, 358 (S.D.N.Y. 1997).

The Bankruptcy Court clearly abused its discretion in failing to modify the Plan injunction for the modest purpose requested by the Photographers. In the words of the Supreme Court, this injunction "has been turned through changing circumstances into an instrument of wrong." *Sys. Fed'n*, 364 U.S. at 647. A serious due process challenge has been raised as to whether this injunction can bind the Photographers and the absent class members they seek to represent. Unless and until the Release and Injunction are adjudicated to be unenforceable, the Photographers (and other potential class plaintiffs) are barred from filing their claims. While litigation in the Bankruptcy Court and this Court (and appeals therefrom) go forward, statutes of limitation continue to run. If the relief sought by the Photographers is not granted, the mere passage of time may result in the extinguishment of valid claims—a patently inequitable and unjust outcome.

## CONCLUSION

For the foregoing reasons, Appellants Bico Stupakoff and Russell James respectfully request that this Court (i) reverse the decision of the District Court in its entirety, (ii) remand this proceeding with direction to the Bankruptcy Court to enter orders (A) denying the Otto Entities' Motion to Dismiss, (B) requiring the Otto Entities to answer the Complaint within ten days, (C) vacating the Rosenbaum Order insofar as it applies to the Photographers and (D) modifying the injunction contained in the confirmed Spiegel plan to permit the Photographers to file their class action complaint against the Otto Entities, and (iii) grant such other and further relief as may be just and fitting under the circumstances.

Respectfully submitted,

HALPERIN BATTAGLIA RAICHT, LLP
Local Counsel to Appellants

By /s/ Neal W. Cohen
Alan D. Halperin (AH-8432)
Donna H. Lieberman (DH-3553)
Neal W. Cohen (NC-3573)
555 Madison Avenue, 9th Floor
New York, New York 10022
212-765-9100

—and—

WILDMAN, HARROLD, ALLEN
& DIXON LLP
Counsel to the Appellants
David J. Fischer
Jonathan W Young
Jeffrey L. Gansberg
225 West Wacker Drive
Chicago, IL 60606-1229
312-201-2000

Dated: June 6, 2007

**RULE 32(a)(7)(C)**
**CERTIFICATE OF COMPLIANCE**

I, Neal W. Cohen, attorney of record for the Appellants, do hereby certify that the foregoing brief complies with the type-volume limitation as set forth in FRAP Rule 32(a)(7). The total number of words in the foregoing brief is 9,585.

Dated: New York, New York
June 6, 2007

HALPERIN BATTAGLIA RAICHT, LLP
Local Counsel to Appellants

By: /s/ Neal W. Cohen
Alan D. Halperin (AH-8432)
Donna H. Lieberman (DH-3553)
Neal W. Cohen (NC-3573)
555 Madison Avenue, 9th Floor
New York, New York 10022
212-765-9100

—and—

WILDMAN, HARROLD, ALLEN
& DIXON LLP
Counsel to the Appellants
David J. Fischer
Jonathan W Young
Jeffrey L. Gansberg
225 West Wacker Drive
Chicago, IL 60606-1229
312-201-2000

# 07-1310-bk(L)

**07-1319-bk(CON), 07-1325-bk(CON)**

IN THE

## United States Court of Appeals

FOR THE SECOND CIRCUIT

IN RE: SPIEGEL, INC., ET AL.,

*Debtors.*

BICO STUPAKOFF AND RUSSELL JAMES,

*Appellants,*

—against—

OTTO (GMBH & CO KG), OTTO DOOSAN LTD., and OTTO SUMISHO INC.,

*Appellees.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

## REPLY BRIEF FOR APPELLANTS

ALAN HALPERIN
NEAL W. COHEN
HALPERIN BATTAGLIA RAICHT, LLP
555 Madison Avenue, 9th Floor
New York, New York 10022
(212) 765-9100

DAVID J. FISCHER
JONATHAN W. YOUNG
JEFFREY L. GANSBERG
WILDMAN, HARROLD, ALLEN & DIXON
225 West Wacker Drive
Chicago, Illinois 60606
(312) 201-2000

*Attorneys for Appellants*
*Bico Stupakoff and Russell James*

## TABLE OF CONTENTS

TABLE OF AUTHORITIES ..... iii

ARGUMENT ..... 1

I. PROTECTION OF THE PHOTOGRAPHERS' WELL PLED CONSTITUTIONAL RIGHTS WAS MANDATORY, NOT DISCRETIONARY ..... 2

II. RULE 60 IS IRRELEVANT TO THE CLAIMS PLED BY THE PHOTOGRAPHERS OR, ALTERNATIVELY, IS WHOLLY CONSISTENT WITH THE RELIEF SOUGHT ..... 4

A. Contrary to the Otto Entities' Suggestion, Declaratory Judgment Actions Are an Appropriate Method of Challenging Infringement of Constitutional Rights ..... 4

B. The Photographers' Claims Are Consistent With and Are Supported by the Requirements of Rule 60 ..... 5

i. Rule 60(b)(4) Provides a Basis for the Photographers' Requested Relief ..... 7

ii. Relief Under Rule 60(b)(6) Is Also Available to the Photographers ..... 10

III. THE OTTO ENTITIES DISREGARD THE RULE 12(b)(6) STANDARD AND CONSTRUE DISPUTED QUESTIONS OF FACT IN THEIR FAVOR ..... 12

A. Determinations Of Whether A Creditor Is Known Or Unknown Is A Question Of Fact..... 12

B. The Otto Entities Ignore the Record in Concluding That "There Was No Question of Fact Regarding [the Photographers/Status As Unknown Creditors" ..... 13

C. The Otto Entities' Arguments Evidence Why the Question of Notice Must be a Question of Fact..... 15

IV. THE DISTRICT COURT'S FINDING OF MOOTNESS WILL BE ERROR IF THE PHOTOGRAPHERS ARE SUCCESSFUL ON THE REMAINDER OF THEIR APPEALS ..... 16

V. THE OTTO ENTITIES FAIL TO ARTICULATE ANY COGENT THEORY FOR DENYING THE MOTION TO MODIFY THE RELEASE AND INJUNCTION..... 18

A. Modifying a Plan Injunction Does Not Implicate Section 1127 ..... 19

B. Rule 60(b)(5) Is an Appropriate Remedy For a Post-Confirmation Discovery of a Constitutional Violation ..... 20

CONCLUSION ..... 22

## TABLE OF AUTHORITIES

**Cases**

*Allianz Inc. Co. v. Lerner*,
416 F.3d 109 (2d Cir. 2005)..... 3

*Bell Atl. Corp v. Twombly*,
127 S. Ct. 1955 (2007)..... 13

*Birnbaum v. Trussell*,
371 F.2d 672 (2d Cir. 1966)..... 4, 11

*Burke v. Ulico Cas. Co.*,
165 Fed. Appx. 125 (2d Cir. 2006) ..... 3

*Celle v. Filipino Reporter Ents. Inc.*,
209 F.3d 163 (2d Cir. 2000)..... 17

*Central Vermont Pub. Serv. Corp. v. Herbert*, 341 F.3d 186 (2d Cir. 2003) .. 8

*Coe v. Armour Fertilizer Works*,
237 U.S. 413 (1915) ..... 4, 9

*Cont'l Cas. Co. v. Coastal Sav. Bank*,
977 F.3d 734 (2d Cir. 1992)..... 3

*Deveraux v. City of Chicago*,
14 F.3d 328 (7th Cir. 1994)..... 4

*Duke Power Co. v. Carolina Envtl. Study Group, Inc.*, 438 U.S. 59 (1978) ..... 4

*Durham v. Brock*,
498 F. Supp. 213 (M.D. Tenn. 1980)... 5

*Earnhart v. Heath*,
369 F. Supp. 259 (E.D. Ark. 1974)..... 5

*Grace v. Bank Leumi Trust Co. of N.Y.*,
443 F.3d 180 (2d Cir. 2006)..... 8, 10

*Green v. Welsh*,
956 F.2d 30 (2d Cir. 1992).....11, 19

*Hospital Assoc'n of New York State, Inc. v. Toia*, 73 F.R.D. 565 (2d Cir. 1977)..... 17

*In re Argonaut Fin. Svcs., Inc.*,
164 B.R. 107 (N.D. Cal. 1994)..... 6, 16

*In re Chapman*,
154 B.R. 258 (Bankr. N.D. Ill. 1993)..12, 13

*In re Graves*,
279 B.R. 266 (B.A.P. 9th Cir. 2002) ... 4

*In re Hendrix*,
986 F.2d 195 (7th Cir. 1993) .....19, 20

*In re Jet Florida Sys.*,
883 F.2d 970 (11th Cir. 1989)..... 19

*In re New York Trap Rock Corp.*,
153 B.R. 642 (Bankr. S.D.N.Y. 1993).. 16

*In re Rideout*,
86 B.R. 523 (Bankr, N.D. Ohio 1988).. 11

*In re Sasson Jeans, Inc.*,
86 B.R. 336 (S.D.N.Y. 1988)..... 6

*In re Texlon Corp.*,
596 F.2d 1092 (2d Cir. 1979) ..... 7

*La Barbera v. J.D. Collyer Equip. Corp.*,
337 F.3d 132 (2d Cir. 2003)..... 3

*Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950) ..... 11, 16

*Nelson v. Adams USA, Inc.*, 529 U.S. 460 (2000) ..... 6, 7

*Pepper v. Litton*, 308 U.S. 295 (1939) ..... 6

*Peralta v. Heights Med. Cent., Inc.*, 485 U.S. 80 (1988) ..... 4, 8, 9, 11

*Perez v. Cumberland Farms, Inc.*, 213 B.R. 622 (Bankr. D. Mass. 1997) ..... 19, 20

*Pullman-Standard v. Swint*, 456 U.S. 273 (1982) ..... 17

*Ruehle v. Educ. Credit Mgmt. Corp.*, 412 F.3d 679 (6th Cir. 2005) ..... 7

*Sea-Land Serv. Inc. v. Ceramica Europa II, Inc.*, 160 F.3d 849 (1st Cir. 1998) ..... 7

*State St. Bank & Trust Co. v. Inversiones Errazuriz Limitada*, 374 F.3d 158 (2d Cir. 2004) ..... 8, 11

*Steiner v. Atochem, S.A.*, 2002 WL 1870322 (S.D.N.Y. 2002) ..... 7

*Swierkiewicz v. Sorema N.A.*, 534 U.S. 506 (2002) ..... 13

*Sys. Fed. No. 91 Ry. Employees' Dept., AFL-CIO v. Wright*, 364 U.S. 642 (1961) ..... 21

*Tulsa Prof'l Collection Servs., Inc.*,
485 U.S. 478 (1988) ..... 16

*United States v. Cardinal Mine Supply, Inc.*, 916 F.2d 1087 (6th Cir. 1990) .... 6

*Weiss v. Bonsai*,
344 F.2d 428 (2d Cir. 1965)..... 17

*Whelton v. Educ. Credit Mgmt Corp.*,
432 F.3d 150 (2d Cir. 2005)..... 8, 10, 11

*Wilton v. Seven Falls Co.*,
515 U.S. 277 (1995) ..... 3

**Statutes**

Fed. R. Civ. P. 60(b).....*passim*

## ARGUMENT

In the Appellees' Brief (the "Otto Brief") the Otto Entities[1] continue their assault on time honored principles of constitutional and procedural jurisprudence, and commit two fundamental errors of law. First, they wrongly assume that enforcement of the constitutional right to due process of law is discretionary and not mandatory. Second, they incorrectly contend that the status of a creditor as known or unknown can be determined as a matter of law where the complaint contains well pled allegations that the creditors were known. While never specifically denying that they were aware of the Photographers' claims, the Otto Entities continue: (i) to hide behind Judge Lifland's conclusion that the Photographers' were unknown creditors and (ii) to argue that this conclusion is insulated from any meaningful appellate review. These arguments cannot avoid the fundamental fact that the lower court's decision constitutes reversible error – both on constitutional and procedural grounds.

This appeal represents the Photographers' last opportunity to prevent the summary elimination of their claims against the Otto Entities without having received either consideration or constitutionally sufficient notice in connection with this deprivation of their rights.

---

[1] Unless otherwise defined herein, defined terms shall have the meanings ascribed to them in the Photographers' opening Appellants' Brief.

## I. PROTECTION OF THE PHOTOGRAPHERS' WELL PLED CONSTITUTIONAL RIGHTS WAS MANDATORY, NOT DISCRETIONARY

As an initial matter, the Otto Entities attempt to minimize the constitutional violation visited upon the Photographers as a "discretionary" matter that should be reviewed on appeal under an abuse of discretion standard. *See* Otto Brief at 10 (*citing Wilton v. Seven Falls Co.*, 515 U.S. 277, 288-90 (1995)). As the Otto Entities would have it, Judge Lifland was under no obligation to hear the Photographers' case, and his ruling is therefore entitled to great deference on appeal. This position misreads both the content of Judge Lifland's decision, as well as the important distinctions and qualifications contained in the *Wilton* decision. Judge Lifland reached the merits of the constitutional issues raised by the Photographers, granted declaratory relief **against them,** and dismissed their Complaint under Fed. R. Civ. P. 12(b)(6). The Otto Entities re-write history when they try to re-frame this ruling as a decision to decline declaratory relief.

The Otto Entities likewise miss the mark in their citation to *Wilton*, conveniently omitting the critical limitation on the Supreme Court's holding:

> . . . district courts' decisions about the propriety of hearing declaratory judgment actions, which are necessarily bound up with their decisions about the propriety of granting declaratory relief, should be reviewed for abuse of discretion. **We do**

> **not attempt at this time to delineate the outer boundaries of that discretion in other cases, for example cases raising issues of federal law or cases in which there are no parallel state proceedings.**

*Wilton*, 515 U.S. at 289-90 (emphasis added). By its own terms, the *Wilton* decision turned on the Supreme Court's concern that a declaratory judgment action not divest a state court of its jurisdiction over a parallel proceeding. *Wilton* simply cannot be stretched to fit the circumstances of the present case, where there was no parallel proceeding to adjudicate the Photographers constitutional claims.[2]

Perhaps most importantly, the Otto Entities misreading of *Wilton* deprives the Photographers of **any** forum in which to seek redress for the constitutional violations inflicted upon them. Indeed, the Supreme Court's holding hinged on the fact that the claims pled could be resolved in a parallel state proceeding. *See Wilton*, 515 U.S. at 279-81. Surely the Supreme Court did not rule that there could be **no** forum for resolving the Photographers' constitutional claims. It necessarily follows that the rulings below should be reviewed *de novo* and not under an abuse of discretion standard. *See La Barbera v. J.D. Collyer*

---

[2] The Otto Entities make the specious suggestion that the Photographers' Rule 60 motion qualifies as a parallel proceeding. *See* Otto Brief at 10 n.5. This suggestion ignores the key point that the Rule 60 motion does not plead the constitutional claims and seeks the more limited precautionary relief of a modification of the Injunction.

*Equip. Corp.*, 337 F.3d 132, 136 (2d Cir. 2003); *Cont'l Cas. Co. v. Coastal Sav. Bank,* 977 F.3d 734, 736-37 (2d Cir. 1992); *see also Burke v. Ulico Cas. Co.*, 165 Fed. Appx. 125, 126 (2d Cir. 2006) *(citing Allianz Inc. Co. v. Lerner,* 416 F.3d 109, 11.3 (2d Cir. 2005)).

## II. RULE 60 IS IRRELEVANT TO THE CLAIMS PLED BY THE PHOTOGRAPHERS OR, ALTERNATIVELY, IS WHOLLY CONSISTENT WITH THE RELIEF SOUGHT

### A. Contrary to the Otto Entities' Suggestion, Declaratory Judgment Actions Are an Appropriate Method of Challenging Infringement of Constitutional Rights

The Constitutional guaranty of due process "is not to be [ ] evaded." *See Coe v. Armour Fertilizer Works,* 237 U.S. 413, 419 (1915). Further, due process challenges to unconstitutional orders are not limited to attacking the underlying order based upon Rule 60 of the Federal Rules of Civil Procedure. *Peralta v. Heights Med. Cent., Inc.*, 485 U.S. 80, 81-82 (1988) (relief sought for violation of due process clause was brought by "bill of particulars" pursuant to state law); *In re Graves,* 279 B.R. 266, 275-278 (B.A.P. 9th Cir. 2002) (treating "response" as Rule 59 motion and finding violation of due process clause). Accordingly, federal courts have consistently held that a declaratory judgment action is a proper method to seek redress for constitutional violations of a party's rights, *See Duke Power Co. v. Carolina*

*Envtl. Study Group, Inc.*, 438 U.S. 59, 71 n.15 (1978); *Deveraux v. City of Chicago,* 14 F.3d 328, 330 (7th Cir, 1994) ("As plaintiffs correctly assert, the Declaratory Judgment Act 'expands the scope of available remedies' and permits persons 'to seek a declaration of the constitutionality of the disputed government action.'") (*quoting Duke Power*); *Birnbaum v. Trussell,* 371 F.2d 672, 673-75 (2d Cir. 1966) (plaintiff filed complaint under federal statute for violation of his due process rights); *Durham v. Brock,* 498 F. Supp. 213, 215 (M.D. Tenn. 1980) (First Amendment challenge to state code of professional responsibility pursued by declaratory judgment action); *Earnhart v. Heath,* 369 F. Supp. 259, 260-61 (E.D. Ark. 1974) (analyzing due process violation in context of declaratory judgment action but ultimately denying, on the merits, the requested relief). Therefore, Appellants' declaratory judgment action in this case was the proper vehicle by which to seek redress for the alleged constitutional violations at issue.

### B. The Photographers' Claims Are Consistent With and Are Supported by the Requirements of Rule 60

While the Photographers were not obliged to plead their claims under Rule 60, the relief they seek is nevertheless wholly consistent with the elements and requirements of that rule. *See* Fed. R. Civ. P. 60(b). In particular, both Rule 60(b)(4) and 60(b)(6) support and authorize the relief requested.

In seeking to use Rule 60 to deny the Photographers a day in court on their constitutional claims, the Otto Entities have it exactly backwards. The Federal Rules of Civil Procedure should not be interpreted to impair constitutional rights.

> The failure of the Bankruptcy Rules to provide relief to creditors who receive no notice of a bankruptcy and have no knowledge of it cannot deprive those creditors of their substantive right not to have their property rights taken away without notice. Bankruptcy Courts are courts of equity and can provide a remedy when there is a substantive right.

*United States v. Cardinal Mine Supply, Inc.*, 916 F.2d 1087, 1091 (6th Cir. 1990) (*citing Pepper v. Litton*, 308 U.S. 295, 303-04 (1939)); *see also In re Argonaut Fin. Svcs., Inc.*, 164 B.R. 107, 115 (N.D. Cal. 1994). In the same vein, the Federal Rules of Civil Procedure are designed to protect and not impair "the due process of law that the Constitution guarantees." *See Nelson v. Adams USA, Inc.*, 529 U.S. 460, 465 (2000). To read Rule 60 as precluding the Photographers' claims would vitiate the maxim that the Rules support due process, and allow a great injustice to be perpetuated in this case. If any of the "rules were construed to preclude challenges to the constitutionality of the procedure [for finding contempt] such a construction would raise questions as to the constitutionality of the rules themselves." *In re Sasson Jeans, Inc.*, 86 B.R. 336, 340 (S.D.N.Y. 1988) (reversing *Lifland, J.* contempt

order issued in violation of due process). Clearly, the Federal Rules of Civil Procedure cannot be used by the Otto Entities as an instrument to further the violation of the Photographers' due process rights.

### i. Rule 60(b)(4) Provides a Basis for the Photographers' Requested Relief

Courts have held that Rule 60(b)(4) provides relief to a party from a final judgment if the judgment is void because the court acted in a manner inconsistent with due process of law. *In re Texlon Corp.*, 596 F.2d 1092, 1099-1100 (2d Cir. 1979) (citation omitted). If a party was denied due process, a court has no discretion but must grant relief from the order. *See Steiner v. Atochem, S.A.*, 2002 WL 1870322 (S.D.N.Y. 2002); *see also Ruehle v. Educ. Credit Mgmt. Corp.*, 412 F.3d 679, 684-85 (6th Cir. 2005); *Sea-Land Serv. Inc. v. Ceramica Europa II, Inc.*, 160 F.3d 849, 852 (1st Cir. 1998) (Court had no discretion but to set aside a judgment void for want of due process).

The Photographers satisfy both requirements for relief under Rule 60(b)(4): (i) the judgment is void[3] because the claimants' due process rights

[3] The Photographers have not taken the position that the Release and Injunction is void on its face or as to all creditors. Rather, they have asserted that these provisions are unenforceable against the parties that did not receive constitutionally sufficient notice. It is undeniable that the Photographers have argued for the invalidity of the Release and Injunction **as to them** regardless of the statutory citation or the "particular words" that they may have used. *See Nelson v. Adams USA, Inc.*, 529 U.S. 460, 469-70 (2000) ("It

were violated and (ii) the relief is timely requested. In their Complaint, the Photographers argued that they were known creditors entitled to actual notice. They further argued that they failed to receive such notice. In the context of a motion to dismiss, the Bankruptcy Court was required to accept those allegations of fact as true and had no discretion to do otherwise, *See Peralta,* 485 U.S. at 84 n.5. As a result, the Photographers' Complaint stated a *prima facie* claim for a due process violation.

Further, the Photographers' request was timely made in the context of Rule 60(b)(4). *See Grace v. Bank Leumi Trust Co. of N.Y.*, 443 F.3d 180, 190 (2d Cir. 2006); *Whelton v. Educ. Credit Mgmt Corp.*, 432 F.3d 150 (2d Cir. 2005). The one year time limit of Rule 60 does not apply to a voidness challenge under Rule 60(b)(4). *See Grace,* 443 F.3d at 189. Rather, the relief sought must be made only within a reasonable time. *Id.* at 190. " 'Courts have been exceedingly lenient in defining the term 'reasonable time' with regard to voidness challenges.' " *Id.* at 190 (*quoting State St. Bank & Trust Co. v. Inversiones Errazuriz Limitada,* 374 F.3d 158, 179 (2d Cir. 2004) (citation omitted)). Under this precedent, this Court

---

is indeed the general rule that issues must be raised in lower courts in order to be preserved as potential grounds of decision in higher courts. But this principle does not demand the incantation of particular words; rather, it requires that the lower court be fairly put on notice as to the substance of the issue." (Citation omitted). And the general rule does not prevent us from declaring what due process requires in this case, for that matter was fairly before the Court of Appeals.")

has found that a motion made under Rule 60(b)(4) was timely made after four years. *Central Vermont Pub. Serv. Corp. v. Herbert,* 341 F.3d 186, 188-89 (2d Cir. 2003).

Contrary to the Otto Entities' allegations, the Photographers sought the relief shortly after learning of the issues in this case. The second amended class action complaint, which sought to name the Photographers as plaintiffs was tendered to the Illinois District Court not in November 2005, but in April 2006.[4] In June 2006, the Photographers filed their Complaint. A period of a few months is not an extended period of time which should obviate relief under Rule 60(b).

Similarly, the Otto Entities argue that any lack of actual notice is immaterial given that the Photographers have supposedly admitted they would not have known the relief that was being sought against them. *See* Otto Brief at 22. Putting aside that the Otto Entities have not fairly characterized the Photographers' arguments, the Otto Entities wrongly suggest that receipt of notice would not have been helpful to the Photographers. The Supreme Court has found that it is not relevant whether the outcome would have been the same with proper notice. *See Peralta,* 485 U.S. at 86-87. "[It] is no answer to say in [this] particular case due process of law would have led to the same result because he had

[4] The "finding" that the Photographers had to have known about their rights in November 2005 is but one example of the Bankruptcy Judge improperly making findings of fact in response to a motion to dismiss. Such "finding" has insufficient record support to be credited.

no adequate defense upon the merits." *Id.* at 86-87 (*citing Coe v. Armour Fertilizer Works,* 237 U.S. 413, 424 (1915)), It is the method of reaching the end result, not necessarily that result, that is important. *Id.* Accordingly, the relief requested by the Photographers is both consistent with and authorized by Rule 60(b)(4).

### ii. Relief Under Rule 60(b)(6) Is Also Available to the Photographers

Rule 60(b)(6) likewise authorizes the relief sought by the Photographers.[5] The Otto Entities argue that the Photographers have not shown: (i) that relief is unavailable under any other section of Rule 60(b); (ii) that the motion was made in a reasonable time; (iii) exceptional circumstances; and (iv) extreme hardship. None of these allegations is correct.

The Otto Entities argue that Rule 60(b)(3) governs the relief sought, so relief cannot be available under Rule 60(b)(6). *See* Otto Brief at 18. Despite the Otto Entities' allegations, relief was neither sought nor available under Rule 60(b)(3). Relief is available under Rule 60(b)(3) only within a year from the entry of the order in question. *See* Rule 60(b)(3). More importantly, the Photographers have never alleged that the Confirmation Order was procured by fraud. Nor have the Photographers sought to attack the Confirmation Order generally as to all parties – only its applicability to parties that did not receive con-

---

[5] To the extent that this Court agrees that relief is proper under Rule 60(b)(4), relief is not necessary under Rule 60(b)(6).

stitutionally sufficient notice. *See generally, Whelton v. Educ. Credit Mgmt. Corp.*, 432 F.3d 150 (2d Cir. 2005).

As explained above, given the constitutional nature of the injuries to the Photographers, they sought relief well within the range of timeliness previously approved by this Circuit. *See Grace*, 443 F. at 190; *State St. Bank & Trust*, 374 F.3d at 179; *see also Whelton*, 432 F.3d at 156 n. 2. Additionally, this Court has held that in seeking to modify a discharge injunction, the prejudice to the movant weighs more heavily than any delay associated with the requested modification, *See Green v. Welsh*, 956 F.2d 30, 35 (2d Cir. 1992).

This case illustrates exceptional circumstances which militate in favor of granting relief under Rule 60(b) had the Photographers sought relief under that rule. There are few (if any) situations which evidence exceptional circumstances more powerfully than the violation of constitutional due process rights. This follows from the exceptional remedy invoked to rectify a constitutional violation of due process rights – the inapplicability of the order as to the party without notice. *See Peralta* 485 U.S. at 87; *Mullane*, 339 U.S. 306, 319-20 (1950); *In re Rideout*, 86 B.R. 523, 528-31 (Bankr. N.D. Ohio 1988).

Further, the Otto Entities' argument that the Photographers never sought relief against the Debtors is inapposite. The Photographers' actions subsequent to the due process violation are irrelevant. The injury occurred when the Debtors and the Otto Entities failed to give notice to the Photographers that their rights were to be impaired.

*See Peralta,* 485 U.S. at 87; *Birnbaum,* 371 F.2d at 679.

Extreme hardship will be inflicted upon the Photographers if the Release and Injunction is upheld.[6] If the Release and Injunction is upheld, the Photographers will be deprived of their property without constitutionally mandated due process of law. Nothing further is required to justify relief under Rule 60(b)(6).

## III. THE OTTO ENTITIES DISREGARD THE RULE 12(b)(6) STANDARD AND CONSTRUE DISPUTED QUESTIONS OF FACT IN THEIR FAVOR

### A. Determinations Of Whether A Creditor Is Known Or Unknown Is A Question Of Fact

The Otto Entities persistently (and incorrectly) argue that the determination of whether creditors are known or unknown is a question of law. *See* Otto Brief at 24. In reaching this conclusion, the Otto Entities badly misread the applicable authority. *See, e.g. In re Chapman,* 154 B.R. 258 (Bankr. N.D. Ill. 1993).

The Otto Entities argue that *Chapman* stands for the proposition that known creditor status is a question of law that can be decided on a motion

---

[6] The Otto Entities also suggest that the hardship is not a balancing test between the Photographers and the Otto Entities. Rather, they argue that the balancing should be geared toward the finality of orders. However, as shown above at section II. B. i., a constitutional violation outweighs the requirements of finality.

to dismiss. Otto Brief at 24. This reading ignores the critical details of the *Chapman* decision.

In *Chapman,* the plaintiff *alleged* that he was not given due process of law. *Chapman,* 154 B.R. at 261. However, the allegations of the complaint "clearly demonstrate facially that Mr. Chapman [plaintiff] received adequate notice in compliance with the due process clause of the Constitution." *Id.* at 263. Thus, *Chapman* stands for the unremarkable proposition that status as a known creditor can be determined on a motion to dismiss where the plaintiff, himself, pled receipt of actual notice. Stated another way, the pleadings in *Chapman* eliminated any possible **factual** dispute on the notice question. *Chapman* does not, and cannot, refute the numerous authorities cited by the Photographers in their opening brief which stand for the proposition that receipt of notice is a classic question of **fact.** *See* Appellants' Brief at 19.

### B. The Otto Entities Ignore the Record in Concluding That "There Was No Question of Fact Regarding [the Photographers'] Status As Unknown Creditors"

The Otto Entities also argue that "there was no question of fact regarding [the Photographers'] status as unknown creditors." *See* Otto Brief at 24. Contrary to the well pled allegations of the Complaint, the Otto Entities argue that the Photographers failed to plead facts to establish that they were known creditors, *Id.* at 27. Under the Supreme Court precedent of *Bell Atl. Corp. v.*

*Twombly*, 127 S. Ct. 1955 (2007) and *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506 (2002), the Photographers have pled sufficient facts to articulate a plausible basis for relief.

The Photographers have alleged, *inter alia*, that (i) they were never given any notice that relief would be sought against them in the Spiegel bankruptcy case, (ii) they were never given notice of the release contained in Spiegel's Plan, (iii) the complaint filed by Peter Rosenbaum Photography Corp. in Illinois put Spiegel and the Otto Entities on notice that there were outstanding claims against them related to numerous photographs utilized by the Otto Entities, including those taken by the Photographers, (iv) the Photographers were known creditors of Spiegel, and parties to an agreement with Spiegel, (v) the Otto Entities knew or should have known that the Plan granted relief for their benefit and against the Photographers, and that the Photographers were therefore entitled to notice of such relief, (vi) the Photographers did not receive notice of the plan and disclosure statement or the Release and Injunction contained therein, (vii) the Otto Entities and Spiegel were aware that liability had been asserted with respect to unauthorized use of copyrighted photographs, (viii) the Plan and disclosure statement were not served upon the Photographers, notwithstanding that the Debtors and therefore the Otto Entities knew or should have known their requested release purported to grant relief against the Photographers, (ix) the Otto Entities knew or should have known that they were seek-

ing relief against the Photographers, (x) the Photographers were known entities entitled to actual notice of the Plan and disclosure statement, as well as the proposed entry of the Release and Injunction, (xi) the Otto Entities and Spiegel failed to provide the Photographers with such actual notice and (xi) the failure to give actual notice to the Photographers violated their rights of procedural and substantive due process, and rendered the release unenforceable as it pertains to the Photographers. *See* Appendix at A-547 – A-550, A-554.

Similarly, the Otto Entities suggest that the Photographers have waived their argument that the Illinois Litigation put the Debtors and the Otto Entities on notice of the Photographers' claims. Such assertion is incorrect. The Photographers have continually urged that one of the bases upon which they were known creditors was the Illinois Litigation. *See* Appellant's Brief at 9.

Further, the Otto Entities make the illogical argument that they do not have notice obligations to the Photographers, only the Debtors do. This argument ignores that it is the Otto Entities who received the benefit of and are seeking to enforce the Release and Injunction. It necessarily follows that the Otto Entities have an obligation to demonstrate that constitutionally sufficient notice of this provision was given – whether by the Otto Entities, the Debtors, or someone else. The Complaint properly alleges that the Photographers were entitled to, but did not receive, actual notice of the Release and

Injunction. Therefore, the Complaint cannot be dismissed on its face.

### C. The Otto Entities' Arguments Evidence Why the Question of Notice Must be a Question of Fact

The Otto Entities also argue that if the determination of known creditor status is a question of fact, the inquiry would require specificity as to the basis of such knowledge. *See* Otto Brief at 29. This argument illustrates the very reason why the determination of known creditor status presents a question of fact. The only way to develop the specificity the Otto Entities believe is required is through an evidentiary hearing which the Photographers were precluded from conducting by virtue of Judge Lifland's ruling.

Whether a creditor was "reasonably ascertainable" is a question of fact. *See Tulsa Prof'l Collection Servs., Inc.*, 485 U.S. 478, 491 (1988) ("Whether appellants' identity as a creditor was known or reasonably ascertainable by appellee cannot be answered on this record."); *see also Mullane*, 339 U.S. at 319. Further, courts in this Circuit have determined that a creditor is known if a debtor "knew or should have known" about the existence of the creditor. *See In re New York Trap Rock Corp.*, 153 B.R. 642, 646 (Bankr. S.D.N.Y. 1993); *see also Argonaut Fin. Svcs.*, 164 B.R. at 112. There can be no question that based upon the Otto Entities' illicit use of the photographers and the existence of the Illinois Litigation, the Photographers were known creditors entitled to actual notice. Lastly, despite all of

their arguments, the Otto Entities never state that they were unaware of the Photographers' claims.

## IV. THE DISTRICT COURT'S FINDING OF MOOTNESS WILL BE ERROR IF THE PHOTOGRAPHERS ARE SUCCESSFUL ON THE REMAINDER OF THEIR APPEALS

The District Court's ruling that the Photographers' appeal from the August Opinion is moot will be incorrect if this Court determines that the Photographers' due process rights were violated. In summarily upholding the Bankruptcy Court's determination to dismiss the Complaint, the District Court found that the appeal of the August Order was moot. *See* Appendix at A-1551 – A-1552. However, the appeal is not moot if it is determined that the Complaint was legally sufficient and the adversary proceeding should proceed. In fact, if the Complaint is viable, the August Opinion purportedly forecloses the relief sought by the Photographers, again without an opportunity for a full hearing on the merits,

As a matter of law, if this Court reinstates the Complaint, it can also order that the August Opinion be modified so as to not foreclose the Photographers' constitutionally protected due process rights. *See Celle v. Filipino Reporter Ents. Inc.*, 209 F.3d 163, 191 (2d Cir. 2000) (modifying order from below instead of remanding for new determination); *Weiss v. Bonsai*, 344 F.2d 428, 430 (2d Cir. 1965). Such a ruling would preserve scarce judicial resources and not require

the District Court (or the Bankruptcy Court) to engage in hearings and findings regarding an issue which can only be determined in one manner – that because the Photographers rights were violated, the August Opinion cannot stand and must not apply to the Photographers' claims, *Hospital Assoc'n of New York State, Inc. v. Toia,* 73 F.R.D. 565, 568 (2d Cir. 1977) (appellate court can determine issue of law instead of remanding case if only one possible outcome); *see also Pullman-Standard v. Swint,* 456 U.S. 273, 292 (1982) (same).

In their Otto Brief, the Otto Entities seek to preserve for themselves the right to supplement their brief if this Court determines to reach the merits of the appeal of the August Opinion, Such request is wholly improper and should not be granted. The Otto Entities had an opportunity to brief the issues that they believed relevant to this appeal. Clearly, the Otto Entities believed that their best argument was to suggest that the Photographers invoked the improper procedural remedy and that the Photographers should have requested a remand to the District Court. If this Court disagrees, they are seeking the right to make further argument. Such additional argument should not be allowed because it was waived in the first instance.[7]

[7] Further, the Otto Entities agreed with the Photographers that each party's brief was to be limited in length. The Photographers opening brief was to be 40 pages or less.

## V. THE OTTO ENTITIES FAIL TO ARTICULATE ANY COGENT THEORY FOR DENYING THE MOTION TO MODIFY THE RELEASE AND INJUNCTION

The Otto Entities concoct a myriad of reasons why the Bankruptcy Court should not have modified the Release and Injunction for the benefit of the Photographers. Like their other arguments, these contentions are unavailing.

In particular, the Otto Entities suggest that the Photographers seek to modify the Plan. In fact, they rename the Photographers' motion from Motion of Bico Stupakoff and Russell James to Modify Plan Injunction for Limited Purpose of Filing Claims in Illinois Litigation Pending Adjudication of Validity of Plan Release (the "Motion to Modify") to "Plan Modification Motion." *See* Otto Brief at 34. Contrary to the Otto Entities' argument, the Photographers are not seeking to modify the Plan. Rather, they are merely seeking limited relief from the Release and Injunction (without conceding its validity), so as to preserve

---

The Otto Entities' response brief was to be 45 pages or less. The Photographers' reply brief was to be 22 pages or less. This agreement was confirmed by Order of this Court on May 14, 2007. The Otto Entities' brief utilized their full 45 pages. Accordingly, any subsequent briefing to which they feel they are entitled is foreclosed because their brief has reached its page limit.

On a more practical level, if the Otto Entities are entitled to supplement their brief, equity would require that the Photographers be entitled to respond. Such supplemental briefing would unnecessarily delay any resolution of this matter.

the status quo while the Photographers' constitutional claims are litigated.

### A. Modifying a Plan Injunction Does Not Implicate Section 1127

The Photographers' request to modify the Release and Injunction does not implicate section 1127 of the Bankruptcy Code. The Photographers are not seeking to modify the Plan. Rather, they are seeking a declaration that the Release and Injunction does not apply to them.

Courts routinely grant motions to modify plan injunctions and discharge injunctions. *See Green,* 956 F.3d at 33-35; *see also In re Hendrix,* 986 F.2d 195, 198-200 (7th Cir. 1993); *In re Jet Florida Sys., Inc.,* 883 F.2d 970, 972-76 (11th Cir. 1989); *Perez v. Cumberland Farms, Inc.,* 213 B.R. 622, 623-24 (Bankr. D. Mass. 1997) (citations omitted). Such courts do so not under the auspices of section 1127, but under a court's equitable power to modify an injunction which it has previously entered. *In re Hendrix,* 986 F.2d at 198-200; *Perez,* 213 B.R. at 623-24. This case is no different than those cited. Thus the Motion to Modify does not implicate section 1127.

### B. Rule 60(b)(5) Is an Appropriate Remedy For a Post-Confirmation Discovery of a Constitutional Violation

Rule 60(b)(5) provides that a court may relieve a party from a final judgment if it is no longer equitable that the judgment should have prospective application. *See* Rule 60(b)(5). The Otto Entities argue that there are no changed cir-

cumstances which would require modification of the Release and Injunction. *See* Otto Brief at 36-37.

The Otto Entities seek to differentiate the cases cited by the Photographers on the basis that there has been no change in circumstances in this case and the mere passage of time is insufficient to provide relief. The Otto Entities are wrong – circumstances in this case have changed since the entry of the Release and Injunction. In making their argument, the Otto Entities take one basis for the denial of a motion made under Rule 60(b)(5) and argue that that is the only basis upon which relief can be granted. *See* Otto Brief at 37. Although no change in law has occurred, that is not determinative as to the Photographers' claims. There has been a very real change in circumstances in this case – the Photographers were much belatedly advised that the Release and Injunction had been entered and purportedly was applicable to their claims. This belated notice constitutes a change in circumstances as to the Photographers which warrants the relief requested. *See Sys. Fed, No. 91 Ry. Employees' Dept; AFL-CIO v. Wright*, 364 U.S. 642, 647-51 (1961). Any argument otherwise is simply unavailing.

## CONCLUSION

The Otto Entities are determined to deny the Photographers their day in court. These efforts do violence to the constitutional principle of due process as well as the standard for resolving a

motion to dismiss. The orders below should be reversed so that the merits of the Photographers' well pled constitutional claims can be tested.

Respectfully submitted,

HALPERIN BATTAGLIA RAICHT, LLP
Local Counsel to Appellants

By: /s/ NEAL W. COHEN
Alan D. Halperin (AH-8432)
Neal W. Cohen (NC-3573)
555 Madison Avenue, 9th Floor
New York, New York 10022
212-765-9100

— and —

WILDMAN, HARROLD, ALLEN
& DIXON LLP
Counsel to the Appellants
David J. Fischer
Jonathan W Young
Jeffrey L. Gansberg
225 West Wacker Drive
Chicago, IL 60606-1229
312-201-2000

August __, 2007

## RULE 32(a)(7)(C) CERTIFICATE OF COMPLIANCE

I, Neal W. Cohen, attorney of record for the Appellants, do hereby certify that the foregoing brief complies with the type-volume limitation as set forth in FRAP Rule 32(a)(7). The total number of words in the foregoing brief is 4584.

Dated: New York, New York
August 3, 2007

HALPERIN BATTAGLIA RAICHT, LLP
Local Counsel to Appellants

By: /s/ NEAL W. COHEN
Alan D. Halperin (AH-8432)
Donna H. Lieberman (DH-3553)
Neal W. Cohen (NC-3573)
555 Madison Avenue, 9th Floor
New York, New York 10022
212-765-9100

— and —

WILDMAN, HARROLD, ALLEN
& DIXON LLP
Counsel to the Appellants
David J. Fischer
Jonathan W Young
Jeffrey L. Gansberg
225 West Wacker Drive
Chicago, IL 60606-1229
312-201-2000

## ADDITIONAL STATUTORY PROVISIONS

Section 1141(a) of the Bankruptcy code, 11 U.S.C.A. § 1141 (a), provides:

> Except as provided in subsections (d)(2) and (d)(3) of this section, the provisions of a confirmed plan bind the debtor, any entity issuing securities under the plan, any entity acquiring property under the plan, and any creditor, equity security holder, or general partner in the debtor, whether or not the claim or interest of such creditor, equity security holder, or general partner is impaired under the plan and whether or not such creditor, equity security holder, or general partner has accepted the plan.

Federal Rules of Bankruptcy Procedure, Rule 8002, Time for Filing Notice of Appeal, provides:

> **(a) Ten-day period**
>
> The notice of appeal shall be filed with the clerk within 10 days of the date of the entry of the judgment, order, or decree appealed from. If a timely notice of appeal is filed by a party, any other party may file a notice of appeal within 10 days of the date on which the first notice of appeal was filed, or within the time otherwise prescribed by this rule, whichever period last expires. A notice of appeal filed after the announcement of a decision or order but before entry of the judgment, order, or decree shall be treated as filed after such entry and on the day thereof.

If a notice of appeal is mistakenly filed with the district court or the bankruptcy appellate panel, the clerk of the district court or the clerk of the bankruptcy appellate panel shall note thereon the date on which it was received and transmit it to the clerk and it shall be deemed filed with the clerk on the date so noted.

**(b) Effect of motion on time for appeal**

If any party makes a timely motion of a type specified immediately below, the time for appeal for all parties runs from the entry of the order disposing of the last such motion outstanding. This provision applies to a timely motion:

**(1)** to amend or make additional findings of fact under Rule 7052, whether or not granting the motion would alter the judgment;

**(2)** to alter or amend the judgment under Rule 9023;

**(3)** for a new trial under Rule 9023; or

**(4)** for relief under Rule 9024 if the motion is filed no later than 10 days after the entry of judgment. A notice of appeal filed after announcement or entry of the judgment, order, or decree but before disposition of any of the above motions is ineffective to appeal from the judgment, order, or decree, or part thereof, specified in the notice of appeal, until the entry of

the order disposing of the last such motion outstanding. Appellate review of an order disposing of any of the above motions requires the party, in compliance with Rule 8001, to amend a previously filed notice of appeal. A party intending to challenge an alteration or amendment of the judgment, order, or decree shall file a notice, or an amended notice, of appeal within the time prescribed by this Rule 8002 measured from the entry of the order disposing of the last such motion outstanding. No additional fees will be required for filing an amended notice.

**(c) Extension of time for appeal**

(1) The bankruptcy judge may extend the time for filing the notice of appeal by any party, unless the judgment, order, or decree appealed from:

**(A)** grants relief from an automatic stay under § 362, § 922, § 1201, or § 1301;

**(B)** authorizes the sale or lease of property or the use of cash collateral under § 363;

**(C)** authorizes the obtaining of credit under § 364;

**(D)** authorizes the assumption or assignment of an executory contract or unexpired lease under § 365;

> **(E)** approves a disclosure statement under § 1125; or
>
> **(F)** confirms a plan under § 943, § 1129, § 1225, or § 1325 of the Code.
>
> **(2)** A request to extend the time for filing a notice of appeal must be made by written motion filed before the time for filing a notice of appeal has expired, except that such a motion filed not later than 20 days after the expiration of the time for filing a notice of appeal may be granted upon a showing of excusable neglect. An extension of time for filing a notice of appeal may not exceed 20 days from the expiration of the time for filing a notice of appeal otherwise prescribed by this rule or 10 days from the date of entry of the order granting the motion, whichever is later.

28 U.S.C.A. § 1334, Bankruptcy cases and proceedings, provides:

> **(a)** Except as provided in subsection (b) of this section, the district courts shall have original and exclusive jurisdiction of all cases under title 11.
>
> **(b)** Except as provided in subsection (e)(2), and notwithstanding any Act of Congress that confers exclusive jurisdiction on a court or courts other than the district courts, the district courts shall have original but not exclusive jurisdiction of all civil proceedings

arising under title 11, or arising in or related to cases under title 11.

**(c)**

**(1)** Except with respect to a case under chapter 15 of title 11, nothing in this section prevents a district court in the interest of justice, or in the interest of comity with State courts or respect for State law, from abstaining from hearing a particular proceeding arising under title 11 or arising in or related to a case under title 11.

**(2)** Upon timely motion of a party in a proceeding based upon a State law claim or State law cause of action, related to a case under title 11 but not arising under title 11 or arising in a case under title 11, with respect to which an action could not have been commenced in a court of the United States absent jurisdiction under this section, the district court shall abstain from hearing such proceeding if an action is commenced, and can be timely adjudicated, in a State forum of appropriate jurisdiction.

**(d)** Any decision to abstain or not to abstain made under subsection (c) (other than a decision not to abstain in a proceeding described in subsection (c)(2)) is not reviewable by appeal or otherwise by the court of appeals under section 158(d), 1291, or 1292 of this title or by the Supreme Court of the United States under section 1254 of this title. Sub-

section (c) and this subsection shall not be construed to limit the applicability of the stay provided for by section 362 of title 11, United States Code, as such section applies to an action affecting the property of the estate in bankruptcy.

(e) The district court in which a case under title 11 is commenced or is pending shall have exclusive jurisdiction—

(1) of all the property, wherever located, of the debtor as of the commencement of such case, and of property of the estate; and

(2) over all claims or causes of action that involve construction of section 327 of title 11, United States Code, or rules relating to disclosure requirements under section 327.

# 07-1310-bk(L)

## 07-1319-bk(CON), 07-1325-bk(CON)

IN THE

## United States Court of Appeals

FOR THE SECOND CIRCUIT

IN RE: SPIEGEL, INC., ET AL.,

*Debtors.*

BICO STUPAKOFF AND RUSSELL JAMES,

*Appellants,*

—against—

OTTO (GMBH & CO KG), OTTO DOOSAN LTD., and OTTO SUMISHO INC.,

*Appellees.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

## BRIEF FOR APPELLEES

ALAN J. LIPKIN
WILLKIE FARR & GALLAGHER LLP
787 Seventh Avenue
New York, New York 10019
(212) 728-8000

HARRY N. ARGER
MARC A. PRIMACK
10 South Wacker Drive, Suite 2300
Chicago, Illinois 60606
(312) 876-1700

*Co-Attorneys for Appellees Otto (GmbH & Co KG), Otto Doosan Ltd., and Otto Sumisho Inc.*

satisfaction of Rule 60(b) *was necessary* to prevail on S&J's Complaint when S&J based their Plan Modification Motion on Rule 60(b).[9]

To avoid Rule 60(b), S&J also rely on *Whelton v. E.C.M.C.*, 432 F.3d 150 (2d Cir. 2005), *see* S&J Br. p. 21, but *Whelton* demonstrates Rule 60(b) applied to S&J's Complaint. In *Whelton*, E.C.M.C. filed a complaint seeking a determination the plan provision discharging the E.C.M.C.'s student loan to the debtor was "void *ab initio*". 432 F.3d at 156 n. 2. This Court found that as E.C.M.C. sought relief from a confirmation order, Rule 60(b), including its time limitation, governed E.C.M.C.'s complaint. *See id.* ("This action is not, however, an action to revoke a confirmation order, but rather to declare one of the provisions of a confirmed plan void *ab initio*. Accordingly, E.C.M.C. was bound only by the 'reasonable time' limitations of Rule 60(b)(4) . . . ."). The fact S&J sought relief under a Rule 60(b) subsection other than Rule 60(b)(4) does not alter the conclusion Rule 60(b) controls.

S&J also incorrectly imply Rule 60(b) was inapplicable here because inadequate notice automatically would exempt S&J from the Release. *First*, S&J cite no case expressly contradicting the cases requiring satisfaction of Rule 60(b)

---

[9] *See* A-1402-03. The Plan Modification Motion and S&J's Complaint both sought relief from the Confirmation Order so S&J could sue Appellees. The Plan Modification Motion just sought such relief on an interim basis. Although S&J insisted they never conceded Rule 60(b) governed S&J's Complaint, S&J's actions spoke louder than words.

when seeking a determination on adequacy of notice in order to obtain relief from a confirmation order. *See* fn. 6. *Second*, as a remedy, the cases addressing inadequate